Supreme Court, U.S.
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No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN KIFER, OFFICER, CITY OF COLUMBUS DIVISION OF POLICE,

Petitioner,

v.

KATHRYN (BECKY) FRIEBIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANET E. JACKSON
Columbus City Attorney

PATRICIA A. DELANEY
COUNSEL OF RECORD
PAULA J. LLOYD
JOSHUA T. COX
Assistant City Attorneys
City of Columbus
90 West Broad Street, Room 200
Columbus, OH 43215
(614) 645-7385

ATTORNEYS FOR PETITIONER

28 pp

QUESTIONS PRESENTED

1. Whether a court reviewing the enforceability of a release-dismissal agreement that bars a § 1983 claim is required to determine enforceability prior to conducting a trial on the merits of the § 1983 claim, as the Third, Seventh and Ninth Circuits have decided, or is it permissible for a court to determine enforceability after a trial on the merits of the § 1983 claim as the Sixth Circuit has held?

2. When does a federal court's invalidation of a release-dismissal agreement based solely on "public interest" constitute an impermissible infringement upon a state court's administration of its criminal justice system?

PARTIES TO THE PROCEEDINGS

Petitioner is John Kifer, a police officer with the City of Columbus, Ohio, Division of Police. Respondent is Kathryn (Becky) Friebis.

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The opinion of the court of appeals (Pet. App. A-3) is unreported. The district court's opinion denying summary judgment is unreported (Pet. App. A-46). The district court's post-verdict decision denying enforcement of the release was oral. (Pet. App. A-19).

JURISDICTION

The court of appeals entered judgment on August 29, 2002 (Pet. App. A-3). Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case squarely presents recurring federal questions stemming from the Court's decision in *Newton v. Rumery*, 480 U.S. 386 (1987), that have not been, but should be, resolved by the Court. In *Rumery*, the Court granted the town's petition for a writ of certiorari "[b]ecause the case raise[d] a question important to the administration of criminal justice." *Id.* at 392. That question—the enforceability of release-dismissal agreements—is no less important, and perhaps more so, than it was in 1987.

In *Rumery*, the Court held that release-dismissal agreements, whereby prosecutors dismiss criminal charges in exchange for a waiver of the criminal defendant's right to sue, are not *per se* unenforceable. *Id.* at 397. The Court held that in determining whether such releases are valid, federal courts must engage in a case-by-case analysis, and that a release is enforceable where (1) the release was entered into voluntarily, (2) there was no prosecutorial misconduct, and (3) relevant public interests would not be adversely affected by enforcement of the release. *Id.* at 398.

However, the appropriate procedure for evaluating the enforceability of release-dismissal agreements under the *Rumery* criteria has divided the lower courts. This split among the circuits is most apparent in the divergent positions of the Seventh and Sixth Circuits. The Seventh Circuit has held that a court should determine the enforceability of a release-dismissal agreement prior to conducting a trial on the merits of a § 1983 claim because holding a trial on the merits of the § 1983 claim constitutes a *per se* invalidation of the agreement. Deferring the determination of the enforceability of the agreement until after a trial on the merits of the plaintiff's § 1983 claim is to say, in effect, that no release can ever avert a hearing on the

merits of the plaintiff's claim (along with the associated expense) even if the state actors prevailed in the end. *Dye v. Wargo*, 253 F.3d 296 (7th Cir. 2001).

On the other hand, the Sixth Circuit allows federal courts to conduct a trial simultaneously on the merits of a § 1983 claim and a determination as to enforceability of a release-dismissal agreement. As explained below, the lower court conducted a trial on the merits of the plaintiffs' claim that included evidence as to whether a judicially-supervised and approved release agreement executed by plaintiffs in prior criminal proceedings was voluntary and as to the prosecutor's motivation for entering the agreement. The jury determined the agreement was voluntary, that probable cause existed for the arrest of both plaintiffs and that the defendant police officer had used unreasonable force against one plaintiff. (Pet. App. A-24). The lower court subsequently ruled that there was no evidence of prosecutorial misconduct in the execution of the release. (Pet. App. A-22). Nevertheless, the lower court refused to give any effect to the release-dismissal agreement based solely on the public interest in upholding the jury finding of unreasonable force and entered the single verdict against the officer. (Pet. App. A-22). The Sixth Circuit affirmed the lower court. (Pet. App. A-8).

The Sixth Circuit's approach, basing enforceability upon an "after-the fact" verdict, amounts to a *per se* invalidation of the release agreement in direct contravention of *Rumery*. Not only does this approach conflict with those circuits that have decided that enforcement of a release should be determined prior to a trial on the merits of a § 1983 action, it also conflicts with two circuit courts, the Fifth and Eighth, which have issued thoughtful decisions upholding enforcement of releases even where favorable verdicts were rendered to § 1983 plaintiffs. These circuits

have determined that the public interest should be evaluated at the time the release is entered into by the § 1983 plaintiff and not later, thereby rejecting the type of revisionism permitted by the Sixth Circuit.

This case illustrates the need for the Court to provide post-*Rumery* direction to the lower courts to achieve the uniform application of the *Rumery* criteria and to prevent the amorphous concept of "public interest," and an undetermined procedure for its evaluation, from serving as the basis for federal courts to effect a *per se* invalidation of release-dismissal agreements. And, as explained below, to prevent impermissible intrusion into the state court's administration of its criminal justice system, particularly in cases where releases are concluded under judicial supervision and as part of the criminal plea bargaining process. All these considerations are compelling federal questions that have not been, but should be, resolved by the Court. The writ should be granted.

1. Like many other state courts and prosecutors' offices throughout the United States, the Franklin County Municipal Court and City of Columbus Prosecutor's Division permit individual criminal defendants to voluntarily enter into release-dismissal agreements, thereby waiving all civil claims, including § 1983 claims, in exchange for reduction or dismissal of misdemeanor criminal charges. These releases are often suggested by criminal defense attorneys as an incentive for prosecutors to reduce meritorious criminal charges. Each City prosecutor has the discretion to accept or reject the release-dismissal offer as part of any plea agreement. If accepted, the Franklin County Municipal Court has a written release-dismissal agreement form available for the parties' convenience. The court supervises and approves the written release-dismissal agreement along with all other terms of

the plea bargain. By resolving cases through the plea bargaining process, with its attendant judicial oversight, a court system like the Franklin County Municipal Court is able to expeditiously administer justice in approximately 50,000 misdemeanor cases each year.

2. In September 1997, Columbus Police Officer John Kifer arrested Robert Friebis and Kathryn (Becky) Friebis at the scene of an accident. Both were taken to jail and charged with obstruction of official business, misdemeanors of the second degree. Robert Friebis was also charged with resisting the arrest of Becky Friebis, also a second-degree misdemeanor. They were released from jail shortly after their arrests. Both retained Mr. Kenneth Spiert, an experienced criminal defense attorney, to represent them on the criminal charges. Both cases were assigned to Franklin County Municipal Court Judge Teresa Liston.

3. The criminal charges remained pending until February 1998, when Assistant City Prosecutor Robert Levering agreed, shortly before the jury trial of the matter, to accept a release agreement offered by defense attorney Spiert on behalf of both Friebises, and offer to plea to minor misdemeanor charges. (Pet. App. A-41; A-67). According to Prosecutor Levering, while the plea offered by the defense was low, he felt it was sufficient punishment to the defendants who had let their emotions get the better of them, resulting in their arrests. Prosecutor Levering stated he was prepared to try the cases if a plea arrangement was not reached, as there were several eyewitnesses at the scene who supported the police officer's version of the arrest. Furthermore, he was not aware of any evidence of misconduct on the part of Officer Kifer, nor did Officer Kifer ever request that a release of liability be part of the plea negotiations.

Prosecutor Levering obtained a one-page release form from Judge Liston's bailiff, and the parties went before Judge Liston and made a record of the plea bargain and releases (Pet. App. A-69). Judge Liston questioned both Friebises as to their agreement and understanding of the release. The releases were signed not only by the Friebises, but also Judge Liston, Prosecutor Levering and defense attorney Spiert. (Pet. App. A-78; A-80). By their signatures, these officers of the court attested that Robert Friebis and Becky Friebis were "fully advised and informed as to the legal aspects and circumstances of signing this Release-Dismissal Agreement and has voluntarily, knowingly and deliberately executed this release." The terms of the release prohibited either defendant from suing the City of Columbus, Officer Kifer, and the paramedics at the scene.

4. Six months later, Robert Friebis and Becky Friebis filed suit under § 1983 in state court against the City of Columbus and Officer Kifer. They alleged that Officer Kifer falsely arrested them and used unreasonable force. They also asserted various state tort claims. Defendants removed the matter to the Federal District Court for the Southern District of Ohio. The defendants filed a motion for summary judgment relying on the release-dismissal agreements as an affirmative defense. The District Court denied defendants' motion, holding that factual issues existed as to whether the agreement was voluntarily entered into and without prosecutorial misconduct. (Pet. App. A-46).

5. The City of Columbus was forced to retain private special counsel (at significant expense) to represent the defendants at trial because City prosecutors would be key witnesses and, therefore, the City Attorney's office could not longer represent the defendants. A jury trial was conducted from September 11, 2000 to September 20, 2000.

The jury found that both Becky Friebis and Robert Friebis voluntarily signed the release-dismissal agreements. (Pet. App. A-24; A-26). The jury found in favor of Officer Kifer on all claims of the Friebises with the sole exception of a verdict in favor of Becky Friebis for $5,000 based upon her claim of unreasonable force.

A post-trial hearing was held and the district court held as matter of law that no prosecutorial misconduct had occurred during the prosecution and resolution of the criminal charges. (Pet. App. A-22). The district court, however, refused to enforce the terms of the release-dismissal agreements based solely upon the jury's single verdict against Officer Kifer. The district court found as a matter of law that it was in the public interest to let the verdict stand and entered the jury's verdict upon the record.

6. Officer Kifer appealed to the Sixth Circuit. On August 29, 2002, the court of appeals affirmed in a 2-1 decision, stating that "[i]t would be inconsistent with *Rumery* and *Coughlen* [*v. Coots*, 5 F.3d 970 (6th Cir. 1993)] if we did not take [the jury's] conclusion into consideration when determining whether the public interest is served by enforcement of the release-dismissal agreement. Given the jury's verdict, we affirm the district court's decision not to enforce the release-dismissal agreement." (Pet. App. A–8).

REASONS FOR GRANTING THE WRIT

It has been fifteen years since the Court issued its decision in *Newton v. Rumery*, 480 U.S. 386 (1987), and important questions left unanswered by that plurality decision have resulted in divergent practices by the lower courts in the application of the *Rumery* criteria, particularly as to how and at what point in the litigation process the

validity of the release-dismissal agreements is to be determined.

The case presented by this writ illustrates the need for the Court to address these issues to prevent the basic holding of *Rumery* from being undermined to the point that such agreements can no longer be used effectively by state prosecutors. The Third, Seventh and Ninth Circuits have properly recognized that conducting a trial on the merits of a plaintiff's § 1983 claim prior to determining the enforceability of a release amounts to a *de facto* invalidation of the release-dismissal agreement regardless of the outcome of the trial. However, the Sixth Circuit has sanctioned allowing cases to proceed to jury verdict prior to the release-dismissal enforcement determination being made by the trial court. The facts of this case provide a good example of how the latter approach can result in improper intrusion by federal courts into matters of prosecutorial discretion and administration of criminal justice in state courts. With recurrence of this departure from the *Rumery* decision being inevitable as precedent continues to be established, this writ should be granted.

I. The Questions Presented Have Divided The Lower Courts

A. The Third, Seventh and Ninth Circuits Have Decided That Pursuant To *Rumery* A Federal Court Must Evaluate The Enforceability Of A Release-Dismissal Agreement That Bars a Plaintiff's § 1983 Claim Prior To Conducting A Trial On The Merits Of The Plaintiff's § 1983 Claim.

The Seventh Circuit's decision in *Dye v. Wargo,* 253 F.3d 296 (7th Cir. 2001), typifies the position of those courts that have held it is not appropriate for a federal court to allow a trial on the merits of a plaintiff's § 1983 claim without first determining whether a release-dismissal agreement, which would bar the plaintiff from proceeding with the § 1983 claim, is enforceable based on the *Rumery* criteria. In *Dye*, the lower court had granted summary judgment to the defendants, the city of Elkhart and a police officer, finding that the plaintiff's claim of excessive force under the Fourth Amendment and 42 U.S.C. § 1983 was barred by the release-dismissal agreement the plaintiff had entered in order to resolve criminal charges. On appeal, the Seventh Circuit assessed the enforceability of the release-dismissal agreement, applying the *Rumery* criteria. The Court held that the release-dismissal agreement (1) was voluntarily entered into, (2) there was no prosecutorial misconduct, and (3) the public interest in enforcement was not outweighed by a federal public policy harmed by enforcement of the agreement. The Seventh Circuit explicitly rejected the plaintiff's argument that there was a "public policy interest in preventing the police from getting

off scot free for shooting helpless suspects." *Id.* at 301. The Court reasoned that in order to determine whether the police officer had used excessive force it would be necessary to hold a trial, which would not only constitute a *per se* invalidation of the release-dismissal agreement but would also contravene the public interest in enforcing the agreement.

> Yet to hold such a trial would be to say in effect that *no* release of liability under § 1983 can be enforced, for a release would never avert a hearing on the merits of the plaintiff's claim and all of the associated expense, even if the state actors prevailed in the end. That would make it harder (if not impossible) for parties to settle their differences without litigation. . . . It is difficult to see how making releases unenforceable could help other persons in Dye's position who might very much want to resolve their disputes, only to be rebuffed by municipalities who would be unwilling to enter agreements that their adversaries could choose to discard.

Id. (emphasis in original).

The Ninth Circuit in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), also recognized that the inquiry the district court must perform in evaluating the enforceability of a release-dismissal agreement that would bar a plaintiff from asserting a § 1983 claim undermines, to some extent, the very purpose of the release-dismissal agreement signed by the parties." *Lynch* at 1129, fn. 10). The Ninth Circuit reversed the lower court's granting of summary judgment to the defendants on the plaintiff's § 1983 claim, however, holding that the lower court had departed from the *Rumery* analysis by failing to evaluate the

public interest factor as distinct from prosecutorial misconduct. On appeal, Lynch argued that because the crime for which he had been charged involved a police officer and no third parties and because his § 1983 claim alleged police misconduct, his release-dismissal agreement was against the public interest. The Ninth Circuit rejected "the categorical approach urged by Lynch because such an approach is inconsistent with the policies outlined by the Supreme Court in *Rumery* . . . . In addition, such an approach would undercut some of the interests furthered by the use of release-dismissal agreements." *Id.* at 1127. The Ninth Circuit remanded the case to the district court for a determination limited to whether enforcement of the agreement would violate public policy. *Id.* at 1128.

The Third Circuit in *Cain v. Darby Borough*, 7 F.3d 377 (3rd Cir. 1993)(*cert. denied*, 510 U.S. 1195 (1994)), has also weighed in on the appropriate analysis of the *Rumery* public interest factor. "The standard for determining whether a release meets the public interest requirement is an objective one, based upon the facts known to the prosecutor when the agreement was reached. Additionally, the public interest reason proffered by the prosecutor must be the prosecutor's actual reason for seeking the release." *Id.* at 381. "[T]he issue is not what the prosecutor might or could have thought; it is what actually motivated him or her in seeking a particular release." *Id.* The Third Circuit made the preliminary determination that Cain's release was unenforceable before remanding the case for a trial on the merits of her § 1983 claim. *Id.* at 383.

B. The Sixth Circuit Allows A Federal Court To Conduct A Trial On The Merits Of A § 1983 Claim That Includes A Determination As To (1) Whether The Release-Dismissal Agreement Was Voluntarily Entered Into And (2) Without Prosecutorial Misconduct And Further Allows That The Jury Verdict On The § 1983 Claim Constitutes A Public Interest Basis For Refusing To Enforce The Release-Dismissal Agreement.

On the other side of the ledger, the Sixth Circuit, in this case, affirmed the lower court's procedure of conducting a combined trial on the merits of the plaintiff's § 1983 claims with a trial presenting evidence as to the enforceability of the release-dismissal agreement. The lower court heard testimony on the merits of the plaintiff's claims in order to elicit evidence as to the voluntariness of the release-dismissal agreement and the absence of prosecutorial misconduct. The issue of voluntariness was then submitted to the jury. The jury concluded that both Becky Friebis and Robert Friebis had been lawfully arrest and voluntarily entered into the release-dismissal agreement, yet returned a verdict in favor of Becky Friebis on her § 1983 claim of unreasonable force. Based on the evidence at trial, the lower court held that there was no prosecutorial misconduct as a matter of law. The lower court then held that the public interest factor of *Rumery* would be served by giving effect to the jury's verdict in favor of Becky Friebis in the amount of $5,000.

On appeal, the Sixth Circuit affirmed the trial court's rationale that the public interest prong of *Rumery* would be served by "allowing the jury verdict to stand." According to the Sixth Circuit, "[i]t would be inconsistent with *Rumery* and *Coughlen* [*v. Coots*, 5 F.3d 970 (6th Cir. 1993)] if we did not take that conclusion into consideration when determining whether the public interest is served by enforcement of the release-dismissal agreement. Given the jury's verdict, we affirm the district court's decision not to enforce the release-dismissal agreement." (Pet. App. A-8).

C. The Fifth And Eighth Circuits Have Refused To Consider the Jury Verdict On The Merits Of The § 1983 Claim In Assessing The Public Interest Factor Of The *Rumery* Analysis.

The Fifth Circuit in *Berry v. Peterson*, 887 F.2d 635 (5th Cir. 1989), reviewed an award of $200,000 to a plaintiff on his § 1983 claim following a jury trial. According to the Fifth Circuit, the only issue necessary to reach on appeal was the enforceability of the covenant not to sue that the plaintiff had entered into which barred his § 1983 claim. Despite the jury's finding that the release-dismissal was unenforceable and the sizeable verdict for the plaintiff on all counts, the Fifth Circuit concluded: "the agreement was not 'involuntary' as is contemplated by *Rumery*, that there was no evidence of prosecutorial misconduct, and that the release was not adverse to the public interest because the release was "an effective, rational bargain with the County" that benefited both Berry and the County. *Id.* at 641. The Fifth Circuit further added:

> The various felony charges pending against Jack [Berry] were not inconsequential, but, unlike the deal struck in *Rumery*, the County did not dismiss those charges but recommended probation, a sensible result when Jack's youth was taken into consideration. The County saved its taxpayers' money by not having to go to trial on any of those charges. In short, the County's handling of this matter was not skewed unfairly toward the interest of its officials while disadvantaging Berry or the public.

Id. at 641.

Furthermore, in *Woods v. Rhodes*, 994 F.2d 494 (8th Cir. 1993), the Eighth Circuit reversed the lower court's denial of summary judgment to defendants, the city of Sioux City and a police officer, who claimed that the plaintiff's § 1983 excessive force and state law claims were barred by a valid, binding release of civil claims as quid pro quo for dropping criminal charges. After denying summary judgment, the lower court sent the case to the jury for a finding on the merits of the plaintiff's claims as well as a finding on whether the agreement was voluntarily entered into. The jury found that Woods did not voluntarily waive her right to sue, and awarded her $200,000 in compensatory damages and $1 in punitive damages. The Eighth Circuit reversed the lower court's denial of summary judgment, holding, "Even assuming it is a fact question, reasonable minds could not dispute that the release in this case was executed voluntarily." *Id.* at 500. The Eighth Circuit similarly concluded as a matter of law that there was no prosecutorial overreaching and the agreement did not violate public policy, noting the courts normally must defer to

prosecutorial discretion. *Id.* at 501. The court implicitly refused to consider the jury's verdict in evaluating the public interest, stating that "[Woods] attempts now to revoke her agreement to the release because she perceives the disadvantages now outweigh the advantages. Woods is not entitled to such revisionism. Having made her bargain, she is now held to it." *Id.* at 502.

II. The Questions Are Recurring In Nature And Significant To Prosecutors, Cities, and State Courts Throughout The Country.

In rejecting the argument that release-dismissal agreements are inherently coercive, the majority in *Rumery* noted the analogy, albeit incomplete, between plea bargains and release-dismissal agreements. *Id.* at 393 n.3. Among the benefits received by the State in plea agreements is "promptly imposed punishment without the expenditure of prosecutorial resources. *Id.* (citation omitted). In addressing the issue of the potential for prosecutorial misconduct, the plurality further noted that prosecutors "must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge." *Id.* at 396 (footnote omitted). Justice O'Connor's concurrence observed that "[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement." *Id.* at 399-400 (citation omitted).

Fifteen years later, similar concerns over resource management in the criminal justice system were behind the Court's decision that the Constitution does not require pre-guilty plea disclosure of impeachment information. *United States v. Ruiz*, 122 S. Ct. 2450, 2455 (2002). Such

disclosure "could require the [Federal] Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages," or, alternatively, to abandonment of the heavy reliance on that process altogether. *Id.* at 2457.

Plea bargaining is equally important to local communities involved in the administration of the state criminal justice process. And while releases are not a standard part of that process, they are a legitimate and valuable component of that process by facilitating resolution of some cases. If state prosecutors are unable to depend on the federal courts to enforce releases--even when the prosecutor has acted appropriately in all respects and the state court judge has properly considered and approved the agreement of which the release is a material term--then this tool loses its utility to the prosecutor and, more importantly, to the plea bargaining process. To allow what are in effect *per se* invalidations to continue unabated would be inconsistent not only with *Rumery*, but also with this Court's decisions in cases like *Ruiz* that have recognized the legitimacy, if not the necessity, of prosecutors' use of plea bargaining and its associated tools. *See, e.g., Blackledge v. Allison*, 431 U.S. 63, 71 (1977) ("The guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system... [The] advantages can be secured, however, only if dispositions by guilty plea are accorded a great measure of finality").

Moreover, if federal courts are permitted to defer the release validity determination until after a trial and verdict, any resources that were saved by local communities as a result of the plea bargain in the criminal case will have been consumed by the cost of the civil case. Particularly given that prevailing defendants in § 1983 actions can rarely

recover attorney's fees, a post-trial validity determination by the trial court does not allow for the recovery of the expended resources, regardless of the outcome of that determination. See *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (defendant's recovery of attorney's fees under 42 U.S.C. § 1988 requires that the plaintiff's action be "meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself sufficient...").

In this case, the expenditure of resources was compounded by the need to bring in both the prosecutor and the judge to testify at trial. The necessity of the prosecutor testifying at trial in turn created a conflict that required the City to expend even more resources to retain outside counsel. Clearly, the public interest in the prudent allocation of limited public resources was disserved, rather than served, by the post-trial *Rumery* determination process that was upheld by the Sixth Circuit in this case. The significance of this issue to local governments, particularly in times of increasingly scarce public resources, independently supports the writ.

III. The Sixth Circuit Erred In Permitting A Trial On The Merits Of The Plaintiff's § 1983 Claim Prior To Evaluating The Enforceability Of The Release-Dismissal Agreement And Further Erred In Holding That The Jury's Verdict In Favor Of Plaintiff On Her § 1983 Claim Was A Public Interest That Rendered The Release Unenforceable.

In *Rumery*, the Court found that, as a matter of federal common law, a release-dismissal agreement will operate to bar a section 1983 claim unless 'the interest in

[the agreement's] enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery* at 392, noting the *Restatement (Second) of Contracts* § 178 (1)(1981). In the comments to the Restatement, the commentators stated: "Whether a promise is enforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law." *Restatement (Second) of Contracts* § 178, comment d (1981).

Thus, it is incumbent upon the federal court to determine whether the § 1983 claim is barred by the agreement prior to commencing a trial on the merits of the § 1983 claim, and such determination perforce must be made in light of the circumstances as of the time that the agreement was entered. In particular, the balancing of public interest must be made in light of the circumstances that motivated the release.

The release in this case was offered by respondent's defense attorney as incentive for the prosecutor to reduce the criminal charges to minor misdemeanors resulting in no jail time and imposition of only a small fine. The prosecutor had felt that the Friebises, who had no prior records, had been sufficiently punished for their offenses by arrest, jail and prosecution, but was willing and prepared to try the case as he felt the charges were meritorious. By resolving the matter through plea bargaining, the government's resources were saved by avoiding a jury trial and the Friebises avoided the risk of conviction on more serious charges. The written release agreements were approved by the criminal defendants, their counsel, the prosecutor and the judge presiding over the criminal cases.

The choice made by a criminal defendant to accept a plea agreement is made at the time he or she pleads guilty, and the validity of the plea is examined by the court at that time. "When a defendant pleads guilty he, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees. Given the seriousness of the matter, the Constitution insists, among other things, that the defendant enter a guilty plea that is 'voluntary' and the defendant must make related waivers 'knowingly, intelligently, [and] with sufficient awareness of the relevant circumstances and likely consequences.'" *United States v. Ruiz*, 122 S. Ct. at 2455 (citations omitted) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also*, *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution").

Under the approach sanctioned by the Sixth Circuit in this case, a state court judge could approve a plea agreement in which a criminal defendant voluntarily waived his or her fundamental right to a fair trial and other accompanying constitutional guarantees (which agreement may result in the judge depriving that defendant of his or her liberty), but yet the criminal defendant's release of all civil claims arising out of the same incident could be invalidated by a federal court solely on the basis of "public interest" and even though the release was contemporaneously approved by the state court judge. This anomalous situation is both illogical and contrary to established principles of Federal-State comity. In this case, the state court judge approved the release as a material part of the agreement between the parties to resolve all disputes related to the incident. If such releases are not *per se* invalid, as *Rumery* held, the state court's judgment as to the release not being contrary to public policy must be honored by a federal court.

Not only does this ruling allow a federal court to disregard the state court's finding by permitting the federal civil suit to proceed, but also it sanctions the federal court's unilateral alteration of the parties' agreement by adding a condition subsequent to that agreement. In this case, the condition added by the lower court allowed the release to be voided in the event of a verdict adverse to the officer. Given that perhaps the most material benefit to such a release is the avoidance of the cost and burden of litigation in the first place, this condition permitting the § 1983 case to proceed to verdict effectively nullifies that release. It would make no sense for the prosecutor to agree to such a condition as part of the plea agreement, and its imposition on the defendants by a federal judge does not make it any more acceptable. *Cf. Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) ("Rule 23(e) wisely requires court approval of the terms of any settlement of a class action, but the power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed").

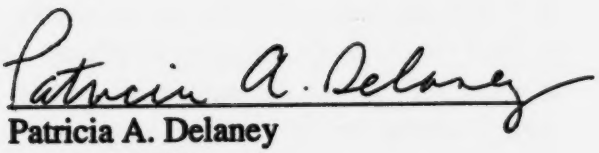
Assuming there has been no coercion or prosecutorial misconduct, a criminal defendant is free to reject any plea offer including a release agreement. However, once that criminal defendant accepts the agreement, he or she is not entitled to receive the benefit of the bargain while avoiding that which they voluntarily offered in consideration for that benefit. See *United States v. Standiford*, 148 F.3d 864 (7th Cir. 1998) (dismissing appeal from sentence after affirming decision to deny defendant's request to withdraw from plea agreement in which he had waived his right to appeal). In this case, the Sixth Circuit has approved the lower court's alteration of the agreement in such a way that totally nullified the

consideration received by the defendants, yet benefited the criminal defendant in all respects.

CONCLUSION

The petition should be granted for these compelling reasons.

Respectfully submitted,



Patricia A. Delaney
Counsel of Record
JANET E. JACKSON
City Attorney
PAULA J. LLOYD
JOSHUA T. COX
Assistant City Attorneys
City of Columbus
90 West Broad Street, Room 200
Columbus, OH 43215

Counsel for Petitioners

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN KIFER, OFFICER, CITY OF COLUMBUS DIVISION OF POLICE,

Petitioner,

v.

KATHRYN (BECKY) FRIEBIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX

JANET E. JACKSON
Columbus City Attorney

PATRICIA A. DELANEY
COUNSEL OF RECORD
PAULA J. LLOYD
JOSHUA T. COX
Assistant City Attorneys
City of Columbus
90 West Broad Street, Room 200
Columbus, OH 43215
(614) 645-7385

ATTORNEYS FOR PETITIONER

81 pp

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NOT RECOMMENDED FOR PUBLICATION
Nos: 00-4351/00-4432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEATRICE FRIEBIS and APRIL FRIEBIS,	)	
Plaintiffs,	)	
ROBERT LEE FRIEBIS **Plaintiff/Cross – Appellant,**	)	
BECKY FRIEBIS,	)	
Plaintiff – Appellee/ Cross-Appellant,	)	
v.	)	**ON APPEAL FROM** THE UNITED STATES DISTRICT COURT FOR
JOHN KIFER,	)	THE SOUTHERN DISTRICT OF OHIO
Defendant– Appellant/ Cross/Appellee,	)	**OPINION**
CITY OF COLUMBUS,	)	
Defendant.	)	

BEFORE: NORRIS and BATCHELDER, Circuit Judges; FORESTER, District Judge. *

ALAN E. NORRIS, Circuit Judge. Columbus police officer John Kifer appeals from a jury verdict of $5,000 awarded to plaintiff Becky Friebis. Four members of the Friebis family filed suit against Kifer and the City of Columbus based on events that

---

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

occurred at the scene of a traffic accident involving April Friebis. The complaint included counts of assault and battery, false imprisonment, intentional infliction of emotional distress, and violation of the Fourth Amendment right to be free of excessive force. A fifth count alleged that the City had inadequately trained its officers.

On appeal, defendant Kifer argues that the district court erred when it refused to enforce a release signed by Becky Friebis that reduced state criminal charges lodged against her by Kifer in exchange for a waiver of any civil claims. Kifer also raises an evidentiary issue involving the district court's decision to permit introduction of certain of his prior acts.

In a cross-appeal, plaintiffs contend that the district court should have instructed the jury differently.

For all the reasons outlined below, we affirm the judgment in all respects.

I.

On September 10, 1997 plaintiff April Friebis, the daughter of plaintiffs Robert and Beatrice Friebis, was involved in an accident on her way home from work. The accident occurred not far from the Friebis home. Friends called their house and April's parents, as well as her older sister, plaintiff Becky Friebis, hurried to the scene. The testimony concerning what occurred at the accident scene was not entirely consistent. Suffice it to say, however, that a verbal altercation between Becky Friebis and Officer Kifer developed that resulted in Becky's arrest. Their father was also arrested when he attempted to intervene.

Becky testified that she was placed in the cruiser after sustaining these injuries: "When he grabbed my arm here, he grabbed my wrist with one arm and the other arm when right here and then he twisted me up. Once he released this part of my arm that's what bruised, it is my real fatty part."

Robert Friebis essentially corroborated Becky's testimony. Like Becky, he stated that the family members obeyed the officer's instructions to stay back from the accident scene. He recalled the encounter between Becky and Kifer in these terms:

> [T]he officer came up to her and said that's enough, and he grabbed her and twisted her arm. And when he started taking her to the cruiser, I could see she was in pain and on her tiptoes and I immediately went over. And I took him by the arm and touched him and told him this is not necessary, she hasn't done anything to deserve this. And he jumped back and told me I was under arrest to get into the cruiser. And I complied and got into the cruiser.

Kifer charged the pair with obstructing official business by remaining in the street near the scene of an accident and interfering with paramedics. He also charged Robert with resisting arrest.

Neither Becky nor her father had ever been arrested before. After their arrests, their attorney negotiated a plea agreement on behalf of his clients with the assistant city prosecutor.

As part of their agreement, the pair signed release-dismissal agreements that waived all civil claims arising from the incident in exchange for reduced charges. Robert pleaded no contest to a minor misdemeanor charge of disorderly conduct; Becky entered a bond forfeiture of $160.

Despite the releases, Robert and Becky, along with Beatrice and April Friebis, filed suit in state court alleged claims of assault and battery (as to Beatrice, Robert and Becky); false arrest and imprisonment (as to Robert and Becky); excessive force and an unreasonable search and

seizure in violation of the Fourth Amendment (as to Robert and Becky); intentional infliction or emotional distress(as to all four plaintiffs); and a final claim against the City for failure to train its police officers adequately. The defendants removed the action to federal court.

The case went to trial in September 2000 and included testimony about the plea negotiations that resulted in the release-dismissal agreements. In reading its decision, the jury completed a verdict form that asked whether Becky and Robert Friebis had voluntarily signed the release-dismissal agreements. As to both plaintiffs, the jury answered yes. It went on to reject all of the claims advanced by plaintiffs with one exception: the jury concluded that Officer Kifer had used excessive force when arresting Becky Friebis and awarded her $5,000.00.

Based upon the jury's conclusion that plaintiffs had entered into the release-dismissal agreement voluntarily, Officer Kifer renewed his request, originally advanced in a motion for summary judgment, that the district court enforce the agreement signed by Becky Friebis. Although it invoked a different rational, the court once again declined the invitation:

> [T[he public interest would be served by allowing this verdict to stand. There was principally substantial evidence of police misconduct as reflected by the fact that there was a specific finding of excessive force in the execution of the legitimate and lawful arrest of Becky Friebis.

II.

1. Should the Release-Dismissal Agreements Have Been Enforced by the District Court?

The Supreme court upheld the validity of release-dismissal agreements, as long as they meet certain criteria, in *Town of Newton v. Rumery,* 480 U.S. 386, (1987). The

Court looked to three general considerations when determining whether enforcement of a release-dismissal agreement is appropriate: whether it was entered into voluntarily; whether there is evidence of prosecutorial misconduct; and whether enforcement furthered the public interest. 480 U.S. at 398. In a concurrence, Justice O'Connor made a point that has subsequently become the law of this circuit: "[I]t is the burden of those relying upon such covenants to establish that the agreement is neither involuntary nor the product of an abuse of the criminal process." *Id.* at 399.

In *Coughlen v. Coots*, 5 F.3d 970 (6th Cir. 1993), this court echoed the concerns of Justice O'Connor:

> Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

Coughlen, 5 F.3d at 973 (quoting *Rumery*, 480 U.S. at 400 (O'Connor J., concurring in part)). This court went on to note, "The burden of proving each of these points falls upon the party in the §1983 action who seeks to invoke the agreement as a defense." *Id.* at 974. Because the district court had not engaged in the kind of analysis required by *Rumery*, but instead treated the release as presumptively valid, we reversed and remanded for further consideration. In doing so, we stressed the fact that evidence of police misconduct should factor into the analysis:

> While a district court conducting a *Rumery* analysis should not prejudge the civil plaintiff's §1983 claim, the existence of substantial evidence of police misconduct in a particular case is by no means irrelevant to a proper *Rumery* inquiry, since it could be probative of the motives of the prosecutor for seeking such an agreement, as well as the degree to which enforcing the agreement would serve the public interest.

Id. at 974.

Although the evidence of police misconduct in the instant case did not rise to the level presented to this court in *Coughlen*, a jury nonetheless concluded that Officer Kifer violated the constitutional rights of Becky Friebis. Accordingly, it would be inconsistent with *Rumery* and *Coughlen* if we did not take that conclusion into consideration when determining whether the public interest is served by enforcement of the release-dismissal agreement. given the jury's verdict, we affirm the district court's decision not to enforce the release-dismissal agreement.

2. *Rule 404(b) Considerations*

"Evidence of other crimes, wrongs, or acts" may be admitted in a criminal trial for purposes other than to prove character. *See* Fed. R. Evid. 404(b). Admission of evidence under Rule 404(b) is decided under a three-step inquiry. First, the trial court must make a preliminary determination as to whether sufficient evidence exists that the prior act occurred. Second, the district court must make a determination as to whether the "other act" is admissible for a proper purpose under Rule 404(b). Third, the district court must determine whether the "other acts" evidence is more prejudicial than probative under Rule 403. *United*

States v. Mack, 258 F.3d 548, 553 & n.1 (6th Cir. 2001); *United States v. Gessa*, 971 F.2d 1257, 1261-62 (6th Cir. 1992). We review a district court's determination as to whether evidence may be admitted under Rule 404(b) for an abuse of discretion. *Mack* at 553 (citing *Trepel v. Roadway Express, Inc.*, 194 R.3d 708, 716 (6th Cit. 1999)).

Since 1990, 22 complaints had been filed against Officer Kifer; two were found to have merit by the police department. The district court denied Officer Kifer's motion in limine that sought to exclude introduction of evidence of the two meritorious claims:

> First, there is sufficient evidence that the other acts occurred as two incident reports were filed, the incidents were investigated, and Officer Kifer was disciplined for one of them. Second, the other acts are admissible to show "absence of mistake or accident," and/or motive or intent. Finally, the Court does not find that the evidence would be "more unfairly prejudicial than probative." Unlike Rule 404(b), this test is a fifty-fifty balancing test weighing prejudice against the probative value of the evidence. The Plaintiffs, as stated, are not attempting to admit evidence of the twenty-two complaints lodged against Officer Kifer, but only one, that the Defendants admit had merit.

Over renewed objection, Marcella Molihan testified briefly at trial that she filed a citizen's complaint against Officer Kifer in 1996 after he had bruised her arm. Photographs of her injured arm were admitted into evidence. Molihan's testimony was relatively brief, however, and the court followed it with this directive to the jury:

> Ladies and gentlemen, evidence that an act was done by defendant Kifer at some other time is not, of course, any evidence of proof whatsoever that at another time defendant Kifer performed a similar act. Evidence of a similar act may not be considered by you, the jury, in determining whether the defendant Kifer actually performed the same physical acts or act alleged in this case. Nor may such evidence be considered for any other purpose whatsoever unless the jury finds by a preponderance of the evidence from other evidence in the case standing alone that the defendant physically did the act alleged in this case.
>
> The evidence of other acts may be considered for other purposes such as proof of notice, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

In addition to the testimony of Ms. Molihan, Officer Kifer objects to a reference during plaintiffs' opening statement to the unsubstantiated complaints made against him. Kifer also stresses that counsel's remarks regarding the testimony of Ms. Molihan during opening statement made clear that he was using her to convince the jury that Officer Kifer was acting similarly with respect to Becky Friebis:

> He had done these sorts of things before. He had a pending lawsuit against him at the time on a complaint that a woman named Marcella Molihan had made where he treated her in almost identical fashion: became enraged, red faced, started screaming at her.

> This woman was in her 60's, grabbed her so hard that it left bruise marks all the way around where he was holding her, came into her kitchen and living room, slammed her up against the wall. . . .
>
> [T]his officer, he did it before. He had 22, 22 citizen complaints for similar internal affairs incidents on his records. Ms. Moulihan may come to testify, the other people will not, but the department knew about this guy. They knew about all those complaint.

After opening statement, counsel for Officer Kifer moved for a mistrial based upon counsel's allusion to the 22 complaints. The court chastised plaintiffs' counsel, but did not grant a mistrial:

> [T]he Court has ruled that evidence of other infractions will come in to show no accident or mistake, not to show compliance therewith. And I think that the context in which it was spoken came perilously close to violating the Court's order but not so much so that the Court is going to at this time declare a mistrial.

The court then gave the jury a limiting instruction:

> [Y]ou have heard in the opening statement of the plaintiff's reference to other complaints that were lodged against Officer Kifer. . . .[T]he arguments of counsel are not evidence.
>
> . . . .
>
> The evidence with respect to other acts would only be admissible to show

> absence of mistake or accident, not to show that he acted in conformity therewith on another occasion.

The manner in which the trial unfolded reminds us of why we review Rule 404(b) rulings for abuse of discretion. While we are troubled by trial counsel's implication that, because Officer Kifer "did it before" he would act inappropriately again, the district court was clearly caught off guard by this line of argument and responded by rebuking counsel and giving the jury a limiting instruction. In our view, the district court responded appropriately to the shifting, often unexpected, dynamics of trial by acting swiftly to correct any potential prejudice. On balance, therefore, we conclude that counsel's remarks, while inappropriate, were not unduly prejudicial to defendant Kifer.

3. Cross-Appeal Concerning Jury Instructions

Becky and Robert Friebis cross-appeal by challenging the district court's refusal to give certain jury instructions that they requested. We review jury instructions as a whole to determine if they adequately inform the jury of the relevant considerations and "provide a basis in law for aiding the jury in reaching its decision." *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 592 (6th Cir. 1986). We will reverse a jury verdict only in situations where the instruction, viewed as a whole is "confusing, misleading, and prejudicial." *Barns v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir. 2000). Finally we will not reverse a decision on the basis of an erroneous jury instruction where the error is harmless. *See United states v. Toney*, 161 F.3d 404, 412-13 (6th Cir. 1998).

Specifically, plaintiffs take issue with the fact that the district court declined to elaborate on what "obstructing official business" means and also did not give an instruction on the First Amendment right to free speech. As Officer Kifer points out in response, the complaint contains no

independent First Amendment claim. Rather, plaintiffs sought this instruction as a means of challenging the legality of the underlying charges. They wished the jury to believe that they were not obstructing official business by exercising their right to speak at the scene of an accident. As the district court recognized, however, the proposed jury instructions go to the underlying state court prosecution, which had already been resolved by the plea agreements:

> If I gave [Officer Kifer's requested] instructions on the obstructing and disorderly, then I could see your argument that you should have the First Amendment instruction. Because if we were trying that particular case, that would be your defense. Your defense would be they have the right to shout. And [Kifer's] position is no, they don't. Under the laws of Ohio, once a police officer tells them a couple of times to get back, they have to stay back.
>
> And that's why I say I'm not going to give an instruction on obstructing or disorderly and I'm not going to give an instruction on First Amendment. I am going to allow [Kifer] to argue what his witnesses have testified to. Just like you elicited testimony from Officer Kifer that he knew that they had First Amendment rights.

The Friebises do not contend that the instructions that were given were incorrect, just that they were overly cryptic and therefore had the potential to mislead. the district court intentionally kept the instructions brief with an eye towards avoiding jury confusion. We conclude that the instructions were neither confusing, misleading, nor prejudicial. Having found no error, we deny plaintiffs' cross-appeal.

III.

The judgment entered by the district court is **affirmed.**

FORESTER, Karl S., Dissenting

I agree with the well-written majority opinion on all points except the question relating to the release-dismissal agreements. Because I believe that the agreements should have been enforced, I respectfully dissent from that portion of the majority's opinion.

In the two cases cited by the majority, *Coughlen v. Coots*, 5 F.3d 970 (6th Cit. 1993), and *Town of Newton v. Rumery*, 480 U.S. 387 (1987), both the United States Supreme Court and this court noted that permitting certain releases "may tempt public officials to bring *frivolous criminal charges* in order to deter *meritorious civil complaints*." *Coughlen*, 5 F.3d at 973 (quoting *Rumery*, 480 U.S. at 400) (emphasis supplied). This court also notices in *Coughlen* that evidence of police misconduct should factor into the analysis and agreements "should be scrutinized closely in cases where *substantial evidence supports an allegations of police misconduct. . . .*" *Id.* at 974 (emphasis supplied). The following examples of police misconduct were cited by the court:

- following use of excessive force, police officers file *unfounded* criminal charges to cover up their own conduct or force the victims to give up their causes of action; and

- prosecutors, aware of a victim's meritorious civil claim, thereafter file *unfounded* criminal charges to protect police officers.

Id. (citing O'Connor's concurrence in *Rumery*, 480 U.S. at 400) (emphasis supplied).

Given the language of these cases, I believe that there are two required findings in a case such as this: (1)

that the plaintiffs have a meritorious civil cause of action; and (2) that the criminal charges brought against them were *unfounded*. Based upon the jury's finding of excessive force by Officer Kifer, the first element appears to be met in this case. However, I do not believe that the facts show the criminal charges against Becky and Robert Friebis to have been unfounded. An independent eyewitness to the events was available to testify against these appellants and apparently would have told a story very difference from theirs, a story that would have supported Officer Kifer's version of events. Further, the court below specifically noted the excessive force was used "in the execution of the *legitimate and lawful* arrest" of the appellants.

Finally, I believe the facts of this case to be much closer to those presented in *Hill v. City of Cleveland*, 12 F.3d 575 (6th Cir. 1993), wherein the appellant was represented by counsel, she was not in custody, she had time to consider the idea of a release in general, and the agreement was reviewed by and executed under the supervision of a judge.

Because I do not believe the charges against the appellants to have been unfounded or artificially trumped up, I do not believe that there was any police or prosecutorial misconduct *with respect to the signing of the release* in this case and, therefore, the release-dismissal agreements should have been enforced.

Case No: 00-4351: 00-4432

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

BEATRICE FRIEBIS, et al.,

Plaintiffs

KATHRYN (BECKY) FRIEBIS

Plaintiff – Appellee Cross-Appellant [00-4351]

ROBERT LEE FRIEBIS

Plaintiff – Appellant [00-4432]

v.

JOHN KIFER, Officer, Columbus Division of Police

Defendant – Appellant Cross-Appellee

BEFORE: NORRIS and BATCHELDER, Circuit Judges; FORESTER, District Judge. *

Upon consideration of the petition for rehearing filed by the appellant cross-appellee,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**. Judge Forester would grant the rehearing.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

*The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 00-4351: 00-4432

Filed: October 10, 2002

BEATRICE FRIEBIS, et al.,

Plaintiffs

KATHRYN (BECKY) FRIEBIS

Plaintiff – Appellee Cross-Appellant [00-4351]

ROBERT LEE FRIEBIS

Plaintiff – Appellant [00-4432]

v.

JOHN KIFER, Officer, Columbus Division of Police

Defendant – Appellant Cross-Appellee

MANDATE

Pursuant to the court's disposition that was filed 8/29/02 the mandate for this case hereby issues today.

No cost taxed
Filing Fee.....$
Printing.....$

Total.....$

A True Copy

Attest:

_____
Deputy Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

- - -

BEATRICE FRIEBIS, et al., :

PLAINTIFFS, :

V. : CASE NO. C2-98-946

OFFICER JOHN KIFER, et. al., :

DEFENDANTS. :

- - -

EXCERPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE, AND A JURY, SITTING AT COLUMBUS, OHIO, COMMENCING ON MONDAY, SEPTEMBER 11, 2000.

APPEARANCES:

JAMES D. McNAMARA, L. LEAH REIBEL, ATTORNEYS AT LAW,

ON BEHALF OF THE PLAINTIFFS.

LUIS M. ALCALDE, DANIEL J. HURLEY, ATTORNEYS AT LAW,

ON BEHALF OF THE DEFENDANTS.

- - -

JOAN E. KOENIG, FEDERAL COURT REPORTER
COMPUTERIZED TRANSCRIPTION

FRIDAY MORNING SESSION
SEPTEMBER 22, 2000

- - -

THE COURT: We are here today to hear argument on the release-dismissal agreement. As the parties are aware, the jury found that the release-dismissal agreements were entered into voluntarily by both Robert Frebis and Becky Frebis, but at the same time the jury determined that the police used excessive force in arresting Becky Frebis and awarded her $5,000. Under the terms of the release-dismissal agreement, if found valid, it would preclude that verdict.

The Court has to consider two other factors with respect to the release-dismissal agreement, and that is whether there was evidence of prosecutorial misconduct and whether the dismissal is against public policy, that is whether the release-dismissal agreement violates public policy as there is a three-part test and the voluntariness prong of the test has already been decided by the jury.

The purpose of this hearing today is to hear arguments of counsel on the issues of police misconduct and public policy.

As it is the defendant's burden as that is an affirmative defense, Mr. Alcalde or Mr. Hurley, are you prepared to proceed?

[intentional gap]

permitted to take away the verdict.

Thank you.

THE COURT: Do you have anything to say in response to that, Mr. Alcalde?

MR. ALCALDE: Well, your Honor, I mean, I don't know how to respond to total speculation other than to speculate myself. I have been talking to the City Attorney's Office and I know how it's going to change things, so there is my speculation. Thank you.

THE COURT: The Court is not going to speculate.

As I said, I have thought quite a bit about it, went back and looked at some of the other cases. And in Coughlen v. Coots, which is a Sixth Circuit case that considered this issue, I discerned what seems almost to be a test under the public policy section. I am going to quote the language:

"Therefore, in a case where there existed substantial evidence of police misconduct, a court reviewing the release-dismissal agreement could conclude that the public's interest in vindicating constitutional rights and deterring police misconduct by permitting a specific civil complaint to go forward, despite a release, outweighs a general prosecutorial interest in helping to manage a heavy case law — I would substitute in there for purposes of this case in helping to prevent the floodgates from opening."

I think that in this case, the public interest would be served by allowing this verdict to stand. There was principally substantial evidence of police misconduct as reflected by the fact that there was a specific finding of excessive force in the execution of the legitimate and lawful arrest of Becky Frebis.

The jury found it and the Court, independent of the jury's determination, agrees. I think that the evidence supports the finding that excessive force was used in the execution of this arrest. And I think that I agree with you, Mr. McNamara, that it does serve as a deterrent to uphold the jury's verdict in this case.

I don't agree with the defense argument that a floodgate will be opened because all of the witnesses testified that release-dismissals are rare, indeed. and because they are rare, I don't think that we are going to see a floodgate of release dismissals, because no one forces the City Attorney's Office or the prosecutor to enter into it.

All of the prosecutors in this case testified that they had a good case. And if they wanted to try it, then they could have tried it. No one forced them to enter into it. And the fact of a heavy case load, as Coughlen instructs, is not ipso facto dispositive.

So I think that, as the Court said, the public's interest in vindicating constitutional rights and deterring police misconduct by permitting a specific civil complaint to go forward, despite a release, outweighs the general prosecutorial interest in keeping the floodgates closed.

So for that reason, the jury's verdict will stand. I find that it is not in the public interest to allow this release-dismissal to stand.

Is there anything else that we haven't taken up at this time? Mr. McNamara?

MR. McNAMARA: No.

THE COURT: Mr. Alcalde?

MR. ALCALDE: Your Honor, I just want to make it clear on the record then. The Court – obviously, we have a jury verdict that it was voluntary. The Court finds as a matter of law that there was no misconduct by the prosecutor; correct?

THE COURT: That's correct.

MR. ALCALDE: And the release is not being upheld on the public policy prong; is that correct?

THE COURT: That's what I said on the record.

MR. ALCALDE: Thank you. That's all I wanted.

THE COURT: Your understanding was clear.

Mr. Hurley, is there anything else?

MR. HURLEY: No.

THE COURT: Thank you very much.

Court is adjourned.

Adjournment at 9:50.

- - -

CERTIFICATE

I certify that the foregoing is a true and correct except from the record of proceedings in the above-entitled matter, heard before the Honorable Algenon L. Marbley, United States District Judge, sitting at Columbus, Ohio on September 22, 2000.

_____ _____

Joan E. Koenig Date
Official Federal Court Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BEATRICE FRIEBIS, et al.,	:	
Plaintiffs,	:	**Case No. C2-98-946**
v.	:	**JUDGE MARBLEY**
JOHN KIFER	:	
Defendant.	:	

VERDICT FORM ONE
BECKY FRIEBIS

We the jury, having been duly empaneled and sworn find the following:

1. Did Plaintiff Becky Friebis voluntarily sign the release-dismissal agreement?

   Yes X No ____

2. Did Defendant Kifer arrest Becky Friebis without probable cause of law?

   Yes ____ No X

3. Did Defendant Kifer violate Becky Friebis's Fourth Amendment right to be free from excessive force?

   Yes X No ___

4. Did Defendant Kifer violate Becky Friebis's Fourth Amendment right to be free from unreasonable seizure?

Yes _____ No X

5. Did Defendant Kifer commit assault and battery upon Plaintiff Becky Friebis?

Yes _____ No X

IF YOU ANSWERED "YES" TO QUESTIONS 2, 3,4, OR 5, CONTINUE WITH QUESTION 6. IF YOU ANSWERED "NO" TO ALL QUESTIONS, 2 THROUGH 5, STOP HERE.

DAMAGES: BECKY FRIEBIS

6. What amount of money is required to compensate Becky Friebis for her actual damages or injuries?

$ 5,000 (Write in a dollar amount)

_____ _____

Foreperson

_____ _____

_____ _____

_____ _____

SIGNED THIS 20TH DAY OF SEPTEMBER, 2000.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BEATRICE FRIEBIS, et al.,	:	
Plaintiffs,	:	**Case No. C2-98-946**
v.	:	**JUDGE MARBLEY**
JOHN KIFER	:	
Defendant.	:	

VERDICT FORM TWO
ROBERT FRIEBIS

We the jury, having been duly empaneled and sworn find the following:

1. Did Plaintiff Robert Friebis voluntarily sign the release-dismissal agreement?

   Yes X No ____

2. Did Defendant Kifer arrest Robert Friebis without probable cause of law?

   Yes ____ No X

IF YOU ANSWERED "YES" TO QUESTION 1 OR 2, CONTINUE WITH QUESTION 3. IF YOU ANSWERED "NO" TO BOTH QUESTIONS, 1 AND 2, STOP HERE.

DAMAGES: ROBERT FRIEBIS

3. What amount of money is required to compensate Robert Friebis for his actual damages or injuries?

$ 0 (Write in a dollar amount)

Foreperson

SIGNED THIS 20TH DAY OF SEPTEMBER, 2000.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

- - -

BEATRICE FRIEBIS, et al., :

PLAINTIFFS, :

V. : CASE NO. C2-98-946

OFFICER JOHN KIFER, et. al.,:

DEFENDANTS. :

- - -

EXCERPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE, AND A JURY, SITTING AT COLUMBUS, OHIO, COMMENCING ON MONDAY, SEPTEMBER 11, 2000.

APPEARANCES:
JAMES D. McNAMARA, L. LEAH REIBEL, ATTORNEYS AT LAW,
ON BEHALF OF THE PLAINTIFFS.
LUIS M. ALCALDE, DANIEL J. HURLEY, ATTORNEYS AT LAW,
ON BEHALF OF THE DEFENDANTS.

- - -

JOAN E. KOENIG, FEDERAL COURT REPORTER
COMPUTERIZED TRANSCRIPTION

Q How many criminal trials, jury trials in your estimation have you presided over since you have been a municipal court judge?

A Well, the Franklin County Municipal Court is the single largest trial court in Ohio. We have more cases than any other court. And I have presided over maybe at least one or two a month for almost ten years.

Q And how may criminal plea bargains have you handled in all your years?

A Literally, thousands of them. An average daily docket in our court, my docket runs anywhere between 50 and 80 cases a day. And those cases, by far the vast majority of them, are resolved in plea negotiations of some sort.

Q What is your role as a judge in a plea bargain?

A My role is to insure that the accused fully understands his or her rights; that the plea negotiation that is being entered into is fair and impartial; that it suits the interests of the citizens of the jurisdiction bringing the action, and it's also fair to the accused.

Q In fulfilling that role, there are certain procedures and questions that you go through; would that be correct?

A Absolutely.

Q Generally, what is it that you do during a plea bargain?

A I make certain that the individual understands if the charge that the individual was originally charged with is being amended by the prosecuting jurisdiction in some way, I let them know that. I let the accused know the maximum possible penalty that they face, the worst case scenario, what

is the worst thing that could happen to you if you enter a plea that was charged.

I do things differently if people are represented by an attorney, obviously, than I do when people are standing before me not represented by an attorney. People not represented by counsel I go through their right to have an attorney present, their right to have a court-appointed attorney if they cannot afford one, other matters like that.

When somebody is represented by an attorney, I normally go through the type of charge that they are facing, the possible penalties that they are facing, so that I am certain that they understand that, and I will make certain that they have consulted with their attorney before they do anything in the case.

And then at the conclusion, once the plea is entered, at the conclusion I allow the attorney to make the statement on behalf of the client and also the accused to make a statement before I would impose any sentence.

Q Do you have to make a determination at least on the record as to whether or not a defendant is entering a plea agreement on a voluntary basis?

A Absolutely.

Q Why do you have to do that?

A First of all, I think it's fundamentally fair. I would never want anybody to do anything that was not voluntary. I want everyone to fully understand the consequences of what they are doing. And a court that is as large as ours and as complex as ours, I take great pains to address people individually, to look at them, to talk to them, to make certain that they understand what they are doing.

If they are not doing it voluntarily, I don't think it's just for them to continue. It's not what our system is all about.

Q Judge Liston, when you are taking a plea bargain and discussing a disposition -- and we'll talk about that in a little bit – are you looking at the parties, are you looking at the lawyer? Explain to the jury what you are doing and perhaps what you're looking for during that process.

A I am talking directly, for the most part, with the accused. I am looking at that individual and speaking to them. I want to make certain that the lawyer is not speaking for this person. The lawyer is not facing any consequences to what they are doing. It's the accused that is facing the potential consequences.

So I spend probably a little too much time some days making certain that people fully understand. Because I believe a lot of misconceptions about our court system are based on people's lack of understanding of what is happening. And so I will spend time directly addressing the accused, and then I sped some time directly addressing the attorney, obviously, as well.

Q Do you look for nonverbal signs?

A Absolutely. For example, for want of a better term body language, the way people are standing, whether or not they're looking at me when they're talking at me, whether people are hesitating in what they're doing, whether people appear confused. It's a court, it's a strange environment for a lot of people, and so I try to be ever more vigilant and sensitive to things that maybe couldn't be verbalized by people but you can tell from their demeanor that they're uncomfortable or they're confused.

Q How often does it come up that there is an issue of a release before you as part of a plea bargain or disposition?

A Well, I would not categorize them as rare. I mean, we do them, but we don't do them with very great frequency at all. I would estimate – and this is only an estimate – that maybe one case a month, 12 or 14 a year, would be how many releases of liability come along with plea negotiations. It's not totally rare, but it's not every day by any stretch of the imagination.

Q Are they common enough that your bailiff has a form?

A Yes, we have forms so that the attorneys can be assisted, so that they don't have to hand draft every document that they're doing. There's a form release that all the bailiffs have available to counsel if they request it. Obviously, there would be nothing that would stop a lawyer from drafting one, but this is really done to assist the attorneys.

Q Judge Liston, I believe you have next to the desk next to you the defendant's exhibits book. Is that correct?

A Yes.

Q I wonder if I could ask you to turn to first tab A. I just want to direct your attention first to some documents that you may or may not need to refresh your recollection regarding dates or anything. If you could turn to Exhibit A-4. Do you have before you the entry for the case of Kathryn Friebis?

A Yes, I do.

Q And then A-5, directly behind that, to do you have a release-dismissal agreement that was executed by Kathryn Friebis?

A Yes.

Q Again, just to inform you where some of the exhibits are, if you would turn to tab B and turn to Exhibit B-5. Do you have before you the sentence entry with respect to

[intentional gap]

[A] attorney, and this is something in a case where you are represented by an attorney in a disposition, you are also being advised by your attorney regarding signing any other documents that would affect what you are doing in my courtroom. So that's why I was saying 'you and your attorney' have done this.

Q Then the answer, and then you asked: Did your lawyer go through this with you, ma'am?

And the answer that you got was yes; correct?

A Yes. I want to make certain that the attorney has fully gone through whatever document – first of all, I don't believe a competent lawyer would go through a release before he advised his clients to sign it, but I want to make certain that the lawyer has been through this with you and you signed this and your lawyer has witnessed it.

Q And then you asked: And do you understand that you are releasing the city from any further liability in this case; that you are agreeing not to sue anyone?

A Yes, I did ask that.

Q And the answer you got was a yes.

A Yes.

Q Did you notice – do you recall any hesitation or any concern throughout any of what we have discussed here or

any demeanor indicating that Kathryn Friebis was having a problem with this decision?

A Absolutely none. As a matter of fact, in that question you notice I didn't just use the legal terminology, 'Do you understand that you are releasing the city from any further liability in this case,' I go on to say in effect that means you are agreeing not to sue anybody. Much like I did earlier when I said forfeit means to give up, I try not to use legal terminology as much as possible, once again to make certain everyone understands what is going on. There is no indication at al that this was anything other than a negotiated agreement between the accuse, her attorney, and the city.

MR. ALCALDE: Your Honor, if you could have a seat, I will try to find my other exhibit.

Your Honor, may I have a moment.

THE COURT: yes, you may.

(Discussion at defense counsel table.)

MR. ALCALDE: I found it, your Honor.

Q Judge Liston, after the matter of Kathryn Friebis was taken care of, then you moved on to the case of Robert Friebis correct?

A That's correct.

Q I have put up here on the overhead a portion of that transcript. We have here that you called the case of Robert Friebis; correct?

A May I step down?

THE COURT: Yes, please do, your Honor.

A Yes, I did.

Q Then Mr. Levering explained the charge of obstructing official business and resisting arrest, there was going to be an amendment of resisting arrest to disorderly conduct which would be a minor misdemeanor in return for a plea to that, and that as part of that there would be a release; correct?

A That's correct.

Q Then what did you do, your Honor?

A This case, the proposed resolution of this case was different than the last one. The last one was an agreed disposition without changing plea. This case was an actual change of plea from one of not guilty to a plea of guilty. So I went through informing the accused of the nature of the charge that was pending now against him, now that the city had made their motion to amend.

I informed the accused that the maximum penalty, the worst possible scenario, which in this case was a fine – which I stated is a fine only of up to $100 and showed the accused our waiver of trial by jury. We have a written form than an accused goes through giving up their right to have a trial when they are going to enter a change of plea and that form, much like this release, is signed by both the attorney and the accused.

What I did then was I said: After consulting with your attorney, do you understand when you sign this statement – and I literally hold it up – when you sign this statement, that you give up your right to have a trial; do you understand this.

Q And then there was also a release with respect to this particular plea bargain; right?

A Yes.

Q And what did you ask?

A I asked: After consulting with your attorney, do you understand that by signing this agreement entitled "Release," that you agree not to sue the city as a result of this incident.

And as I recall, Mr. Friebis had also been in the courtroom during the entire disposition of his daughter's case, so he was standing in the courtroom hearing that disposition as well as his own.

Q Was Mr. Spiert standing there?

A Oh, absolutely, Mr. Spiert was counsel of records standing up beside and advising both of these individuals.

Q And Mr. Friebis responded yes.

A Yes.

Q At any time during this exchange between the Court and Robert Friebis, did you note any hesitation, any lack of understanding on his part?

A Absolutely not.

MR. ALCALDE: We have no further questions, your Honor

THE COURT: Thank you, Mr. Alcalde.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

- - -

BEATRICE FRIEBIS, et al., :

PLAINTIFFS, :

V. : CASE NO. C2-98-946

OFFICER JOHN KIFER, et. al., :

DEFENDANTS. :

- - -

EXCERPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE, AND A JURY, SITTING AT COLUMBUS, OHIO, COMMENCING ON MONDAY, SEPTEMBER 11, 2000.

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- - -

JOAN E. KOENIG, FEDERAL COURT REPORTER
COMPUTERIZED TRANSCRIPTION

carrying a possible maximum sentence of up to 30 days in jail a fine of $250 and court costs.

Q Okay. So that's the offer you made?

A That's the offer I made.

Q What did he say?

A He said, I'll have to talk to my clients about it.

Q Then what happened?

A My recollection is that he left the room, and I'm assuming at that point that he would have gone to -- there is a small conference room just off the vestibule to the courtroom, to municipal court – would have gone there or out in the hallway, since it would have probably been pretty deserted, and talked to his clients about that plea bargain.

After a period time, he came back.

Q And what happened when he came back?

A At that point, he said, My clients are not willing to plead to that. And he then said, How about a dismissal for a release?

Q Explain what that means, 'how about a dismissal for release.' How did you interpret that?

A Well, how I interpreted that, and how it is generally interpreted, is that he was asking us to dismiss the charges against his clients and in return he indicated that his clients would execute releases of liability for the city and for the police officers involved in the case.

Q Let me ask you this question: Had you heard any discussion about a release prior to this?

A No. When I talked to Robert prior to this case coming up, he did not indicate to me that there was any discussion of releases and I didn't discuss it in my original plea bargain offer.

Q Had you interviewed any witnesses in this case?

A No, I had not.

Q Had you interviewed Officer Kifer?

A No, I had not.

Q All you had was the file.

A I had the file, plus I had had a discussion with Robert who had talked to the medics, to the civilians that would probably be testifying for us in the case. He had done relatively extensive preparation for a municipal court case on this case, so I relied on what he had indicated to me the witnesses were going to be saying in the case.

Q You said extensive preparation for a municipal court case.

A That's correct.

Q You better explain to the jury was extensive preparation is for a municipal court case.

A Sure. Each prosecutor in municipal court is responsible for a judge's docket. The judge's docket normally on any given month had between 400 and 600 or more cases pending at any one time. Now a prosecutor is going to be responsible for that. Many of those cases are not going to be real extensive. Cases are going to be traffic, speeding tickets, red light tickets, minor accident cases, many of them are going to be more extensive, they're going

to be domestic violence charges, assault charges, theft charges, resisting arrest cases.

But what that means, the volume of cases means that the prosecutors are going to not be able to talk to all of the witnesses in every case prior to trial. In fact, they're not going to talk to most of the witnesses prior to trial. If you're lucky, many times you'll get to talk to them in the interim after final plea bargains and before the jury is brought out. That's just a fact of life in municipal court and you learn to deal with it.

Q So, Mr. Levering comes back and tells you that –

A No, Mr. Spiert.

Q I'm sorry. Mr. Spiert comes back and tells you that in exchange for a dismissal, they will execute releases.

A Right

Q What did you do?

A I said that I would not agree to that. If the officer wants to agree to it, I will go and talk to him about it, but I didn't think he would agree to it.

Q Why did you want to talk to the officer even though you wouldn't agree to it?

A In my estimation when I evaluated this case, I thought a fair offer was a plea to two disorderly conduct charges. I thought a dismissal for release would have been a gift to the defendants by the police officer, and I wasn't about to agree to that unless the officer wanted to give them a gift.

Q Why did you evaluate a fair bargain as being a plea to two disorderlies, what did you take into consideration?

A I thought, given that they were guilty of the offenses, but in offering the two disorderly conduct charges I wanted to take into consideration the context of their actions. Although they were out of line at the scene of this accident, there was an accident in which a family member of theirs was hurt and I took that into consideration in offering to plead to the two M-4 disorderly conduct charges. they had been arrested and I thought that there was little else to gain other than to plead to the disorderly conduct charges.

Q But that is not the offer that Mr. Spiert made to you.

A No, he counteroffered with a dismissal for releases.

Q Did you then go talk to Officer Kifer?

A Yes. I then sought him out to see if he was around and he was around and he was –

Q Why was Officer Kifer there that day?

[intentional gap]

Q He comes back and says a minor misdemeanor disorderly for Robert and a bond forfeiture for Kathryn; right?

A Right. And he's still offering a release at that point.

Q What did you do?

A I told him that I would go and talk to the officer about that but that before I did so, I wanted him – I asked him whether or not his people were going to accept that. Because I don't want to go back and talk to the officer again about another—what I considered a gift – without first having the knowledge that they were going to accept it. I didn't want to have the officer then accept it and then have them come back and negotiate one more time.

Q Do you care what the officer thinks?

A Well, at the point at which I made my original offer, I didn't really care what the officer thought.

Q Which offer was that?

A That was the plea to the two M-4 disorderly conducts. I felt that was a fair offer and I would have been ready to stand by it if the officer had been upset about it. But at the point where we're talking about a bail forfeiture on one, a pleas to a minor misdemeanor disorderly conduct charge on another, I considered that would have been a gift by the officer. And I'm not going to go ahead and go along with that unless the officer is willing to give them a gift.

Q You keep using the term gift. What do you mean by that?

A I thought it was a low plea bargain that wasn't warranted by the facts that only the prosecution would only go along with if the officer was feeling generous and willing to allow them to plead to that.

Q So you told Mr. Spiert that he had to go talk to his clients so you could get assurances that that's what they wanted to do?

A I wanted to make sure that they were going to agree to it, yes.

Q Did he leave?

A Yes.

Q What happened next?

A They were out either in the hallway of in the conference room again for a considerable amount of time.

He came back, Ken Spiert came back, and he indicated to me that Robert was willing to plead to the M-4 disorderly but that Kathryn was having a problem with doing the bail forfeiture and a release.

Q What was your response to that?

A My response was that if we're going to do that plea bargain, that I wanted both of them to enter a plea on it and I wanted the release from both of them.

Q Why did you say that?

A Again, because I thought it was a gift and I did not – if the officer was going to give them a generous plea bargain, I thought the case should end right there.

Q Have you talked to Officer Kifer up to this point about a release at all?

A I mentioned to him, of course, when I went back initially and said that they were offering a dismissal with a release.

Q And he said no.

A He said no.

Q But did you have any discussion with him about whether he wanted a release?

A Yes, I did, after –

Q I mean up to this point. We'll get to the after.

A No, not up to this point.
Q Has he ever demanded a release?

A No.

Q Now we're at the point where you and Mr. Spiert are discussing a plea to a minor misdemeanor and a bond forfeiture.

A Yes.

Q And he's offered the releases – he offered the release.

A And he's offered the release and he has come back and said Kathryn is having a problem with signing the release.

And I indicated to him that if she didn't want to sign the release, just have her plead to the disorderly conduct charge. If you're worried about sentencing, let's go back and talk to Judge Liston beforehand about sentencing. I was reasonably confident that Judge Liston was not going to send them back to jail again on a plea to two M-4 disorderlies, or actually any sort of offense; that at worst they were maybe facing some probation.

Q I want to make clear about one thing to the jury: Who wants a release for a plea to a minor misdemeanor and a bond forfeiture?

A I want it.

Q You want it?

A Yes.

Q Right. And you hadn't – had you talked to Officer Kifer about this other than what you have stated?

A No., other than to go back in short conversation relaying the prior requests for dismissal for release.

Q Why do you want a release now?

A Again, because I thought that offer -- that if they ended up pleading to that, it would be a gift, and that at that level I would want a release. They had put it on the table and I wasn't – at that level I wasn't going to allow them to take it off. They had the option of pleading to the disorderly conduct charges; they had the option of going back and finding out what Judge Liston was going to do on a plea to those two charges, which I was reasonably certain they were not going to end up doing any great penalty.

Q The offer that you made without any releases would have been an M-4?

A Yes.

Q And what would have been the maximum penalty for that?

A Just what I said previously, which is they would have done no further jail time than their arrest already, and at worst they might have ended with a fine only, or the worst they would have been on probation for a period of time.

Q Would you have asked for any jail time?

A No.

Q All right. Did he come back and tell you?

A He went back and he had a long conversation with his clients and he came back and he said, All right, they'll plead to the disorderly conduct charge, the bail forfeiture, and they'll both do the release.

Q What did you do?

A At this point I went back and had a conversation with Officer Kifer. And at this point I remember there was a couple of other officers who were in the small room back

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Beatrice Friebis, et al.	:	
	:	
Plaintiffs.	:	**Case No. C2-98-946**
	:	
v.	:	**Judge Marbley**
	:	
John Kifer, et al.	:	**Magistrate Judge Kemp**
	:	
Defendants.	:	

OPINION AND ORDER

I. INTRODUCTION

This matter is before the Court on the Defendants', Officer John Kifer and the City of Columbus, Motion for Summary Judgment. the Plaintiffs, Beatrice, Robert, Becky and April Friebis, have brought suit under 42 U.S.C. § 1983 alleging violation of their Fourth Amendment right to be free from unreasonable searches and seizures. The Plaintiffs have also brought several claims, under this Court's supplemental jurisdiction, including: (1) assault and battery, (2) false arrest and false imprisonment and (3) intentional infliction of emotional distress. The reasons set forth below, this Court **DENIES** Officer Kifer's Motion for Summary Judgment with respect to Mr. Friebis and Becky's release-dismissal agreement and Mrs. Friebis's Fourth Amendment claim; **GRANTS** the Defendant's Motion for Summary Judgment with respect to Mrs. Friebis's false arrest, false imprisonment; **GRANTS** with respect to Mrs. Friebis's intentional infliction of emotional distress; **DENIES** April's intentional infliction of emotional distress claims; and **DENIES** as claims exist against Officer Kifer, the Defendant's Motion for Summary Judgment with respect to the City of Columbus.

II. FACTS

A. The Plaintiff's Version

The Plaintiffs are four member of the Friebis family: Robert, the father; Beatrice ("Connie"), the mother; and Kathleen ("Becky") and April Friebis, the two daughters.

On September 10, 1997, a rainy night, April was on the way home from work when she was involved in a car accident at the intersection of North Wilson Drive and Valleyview Drive. The impact of the collision shattered the windshield of the van April was driving. April was trapped in the van and was getting wet from the rain that was falling through the broken windshield. The first person to arrive at the scene of the accident was a man who identified himself as a paramedic and offered to help April. The Defendant, Officer Kifer, next arrived at the scene of the accident. Officer Kifer told the paramedic to get away from the van, to go onto the sidewalk; or else he would be arrested. Officer Kifer told April to "quit your crying," to "shut up," and then walked away from April and left her sitting wet and injured in the van.

After the Friebis family was notified that April was in a car accident, they drove to the location. When the family members arrived, emergency personnel were attending to April's injuries. Mr. Friebis and Becky first arrived at the corner where the accident took place. Mrs. Friebis and Beverly Seymour next arrived.[1] Officer Kifer approached the family members, got close to their faces and began shouting at them to get back. Mrs. Friebis asked "why are you yelling at me, I didn't do anything." Becky told Officer Kifer, "this is her father." Officer Kifer replied, "shut up." Officer Kifer kept walking back and forth on the street in front of the family members, yelling at them and telling them to stay back.

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[1] Beverly Seymour is the Friebis' other daughter and is not a party to this suit.

Emergency personnel began to attempt to remove April from the vehicle. April was crying and this upset Mrs. Friebis. So Mrs. Friebis did not have to see her daughter suffering, she took a few steps away from the vehicle, off of the curb and onto the side street. Officer Kifer approached Mrs. Friebis from behind, grabbed her arm, pulled it back behind her and moved her backwards. Officer Kifer's actions caused Mrs. Friebis to suffer three bruises and an injury to her shoulder blade.

Becky approached Officer Kifer to ask him what hospital her sister was being taken to by the ambulance. Officer Kifer responded by saying "I've had enough." Kifer reached around another family member and grabbed Becky by the arm. He twisted Becky's arm behind her back and dragged her sideways. Becky, scared, crying and walking on her tiptoes, was pushed toward the police cruiser.

Mr. Friebis witnessed Becky being escorted to the cruiser. To avoid having Officer Kifer slam Becky up against the police cruiser, Mr. Friebis put his hand on Officer Kifer's arm and said "that's not necessary." Officer Kifer shoved Becky up against the cruiser, held her there and told Mr. Friebis that he was also under arrest. Mr. Friebis walked to the cruiser and got inside. Officer Kifer put Becky in the cruiser next to her father.

Robert Friebis was charged with obstructing official business and with resisting Becky's arrest. Becky Friebis was charged with obstructing official business. Attorney Ken Spiert represented the Friebis family in their criminal case. In October, Robert and Becky were offered a sentence of a lower misdemeanor if they signed a release of liability. Both Robert and Becky rejected this proposal.[2] A release-dismissal agreement was finally signed by Mr. Friebis and Becky. Becky claims that "[she] was not happy with [the agreement]."

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[2] The Friebis family had already made a citizens complaint against Officer Kifer before they began discussing a plea.

At the oral argument, the Friebis family presented additional facts about the plea bargain they signed which ultimately included a release-dismissal agreement. The prosecutor assigned to Mr. Friebis and Becky's case was Robert Levering. The Friebis family contends that Officer Kifer took an active role with Levering in negotiating the plea agreement with Becky and Mr. Friebis. According to the Friebis family, Officer Kifer required that a release-dismissal agreement be a part of the plea bargain. The Friebis family further contends that Becky informed Levering that she did not wish to sign the release-dismissal agreement, and that Levering replied that if she did not sign the agreement that he would not lower the charges brought against her father, and that her father would be forced to go to trial.

B. The Defendant's Additional Facts

On February 3, 1998, both criminal cases were resolved by Assistant City Prosecutor Robert Levering. Mr. Friebis pled to an amended charge of disorderly conduct, a minor misdemeanor, paid a fine and court costs and signed a release of liability in favor of the City of Columbus and Officer Kifer. Becky Friebis agreed to forfeit a bond in the amount of $160 in exchange for a reduction of the charge to disorderly conduct, a minor misdemeanor. She signed a release in favor of the City of Columbus and Officer Kifer.

III. DISCUSSION

A. Release-Dismissal.

The Supreme Court held in *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987), that a release dismissal agreement is not per se invalid.[3] The factors the Court

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"[3] *Rumery* was a heavily divided decision. Justice Powell wrote the decision of the Court with respect to Parts I, II, III-A, IV and V. Justices Rehnquist, White, O'Connor and Scalia joined. With respect

considered in determining the validity of the release-dismissal agreement were: whether it was voluntary; whether there was evidence of prosecutorial misconduct; and whether enforcement of the agreement would adversely affect the public interest. *Id.*. at 398; *Coughlen v. Coots,* 5 F.3d 970, 974 (6th Cir. 1993).

The Court in *Rumery* focused on Rumery's skills and education; his defense attorney's experience; the fact that Rumery's attorney drafted the release; that Rumery had three days to discuss the agreement with his attorney before signing; and that the fact that Rumery was not in custody at the time he signed the release-dismissal agreement. Voluntariness is the only question of fact in a *Rumery* determination. *See Berry v. Peterson,* 887 F.2d 635, 640 (5th Cir. 1989).

As for the second factor used to determine the validity of a release-dismissal agreement, the Sixth Circuit gave several examples of what courts should focus on to determine if prosecutorial misconduct occurred:

> [s]ituations where, following their use of excessive force, police officers file unfounded criminal charges as bargaining chips to cover up their own conduct or to induce the victim to give up his case of action; or where a prosecutor, upon discovering that the victim has a meritorious civil claim, files frivolous criminal charges in order to protect the police officer.

Coughlen, 5 F.3d at 974. Other evidence of prosecutorial misconduct includes a situation where a "[p]rosecutor secured a release-dismissal bargain in the face of substantial evidence of police misconduct. . ." *Id.* This is a

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to Part III-B, Justice Rehnquist, White and Scalia joined. Just O'Connor filed an opinion concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion and was joined by Justices Brennan, Marshall and Blackmun. 40 U.S. at 388.

questions to be determined by the court and not by the jury. *See Hill v. City of Cleveland,* 12 F.3d 575 n.3 (5th Cir 1993) (citing *Berry v. Peterson,* 887 F.2d 635, 637 (5th Cir. 1989) (finding prosecutorial misconduct to be an issue of law)).

As for the third element, the Sixth Circuit has interpreted *Rumery* to mean that the public interest can be if the ";prosecutor demonstrates that obtaining the release was motivated by and independent, legitimate criminal justice objective." *Id.* at 975 (citations omitted).[4] This also is an issue of law for the court to decide. *See Berry,* 887 F.2d at 637.

The Defendants argue that the release-dismissal agreement executed as part of the plea negations is valid. To support their argument, they quote the following

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[4] The Sixth Circuit provided several examples of a "legitimate criminal justice objective" which include:

> [t]he reason proffered by the prosecutor for the release-dismissal agreement in this case – "to aid in the disposition of its heavy case load" – would probably suffice under ordinary circumstances *See id.* at 401, 107 S. Ct. at 1196 (O'Connor, J., concurring in part and in the judgment) (citing "allocation of criminal justice resources" as a "legitimate criminal justice" concern). . . . Examples of other legitimate criminal justice objectives that come to mind are situations where the cost of prosecution would outweigh the benefits accruing to the public from a conviction; where the strength of evidence of criminal conduct is doubtful even though charges were filed in good faith; where witnesses or evidence are no longer available; where evidence is subsequently discovered that points to the criminal case defendant's innocence; or where criminal charges are not the product of prosecutorial misconduct and both sides benefit substantially from a balanced settlement in the sense that both avoid exposure to potential liabilities and expenses.
>
> *Coughlen,* 5 F.3d at 975.

exchange that took place before Franklin County Municipal Judge Teresa Liston.

THE COURT: Ms. Friebis, the prosecutor has indicated to the court that he is willing to resolve this matter if the Court sill allow you to post bond in the amount of $160 to the clerk of this court and have that amount forfeited; that means given up. After speaking with your attorney, first of all, do you understand the plea bargain and disposition being offered to you in this case?

MS. FRIEBIS: Uh-huh, yes

THE COURT: And after consulting with your attorney, are you in agreement with this?

MS. FRIEBIS: Yes.

***

THE COURT: And also in exchange for this disposition of the case, you and your attorney have entered into an agreement that is a release of liability. Did your lawyer go through this with you, ma'am?

MS. FRIEBIS: Yes.

THE COURT: And do you understand that you are releasing the City from any further liability in this case, that you are agreeing not to sue anyone?

MS. FRIEBIS: Uh-huh, yes.

The Defendants conclude that the release-dismissal agreement should be upheld and that on the basis of this agreement, that they should be granted summary judgment.[5]

In response the Plaintiffs argue that the extensive evidence of police misconduct precludes enforcement of the releases signed by Becky and Mr. Friebis. The Plaintiffs' attorney, Kenneth Spiert, did not advise the Friebis family members that signing the releases necessarily would terminate their right to sue. Instead, Spiert told his clients that the releases were legally suspect and subject to challenge in a later civil action.

Viewing the facts in a light most favorable to the Plaintiffs, the Court finds that there is a genuine issue of material fact about whether Mr. Friebis's and Becky's release-dismissal agreements are valid. First, a reasonable fact-finder could conclude, despite their Municipal Court testimony, that Mr. Friebis and Becky did not enter into the agreements voluntarily.[6] There is evidence that Attorney Spiert informed the Friebis family members that the release-dismissal agreements were not necessarily

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[5] In oral argument, the Defendants cited *Staggs v. Ausdenmoore*, No. 92-3172, 1993 WL 131942, at *4 (6th Cir. Apr. 27, 1993), to support their argument that the fact that the Friebis' criminal attorney did not make an objection to the release-dismissal agreement on the record indicates that it was voluntary.

This is one possible interpretation of Mr. Friebis and Becky's failure to object to the agreements on the record. Other possible interpretations include the fact that their attorney had told them that the agreement was subject to a later challenge, or that Becky knew that if she did not sign the agreement that her father would have to face trial. This issue is one of fact and will be left to the jury to determine.

[6] The Court concludes that both Plaintiffs satisfy a few of the *Rumery* considerations of voluntariness; Mr. Friebis and Becky both have high school educations; the release agreements were discussed by the parties, between October of 1997, and February 3, 1998; during this three month time period, the Plaintiffs had time to meet with their attorney about the terms of the agreement; and finally, neither Mr. Friebis, nor Becky were in custody at the time they signed the agreements in question.

valid and could be subject to later challenge by civil action. The questionable advice given by Spiert to Becky and Mr. Friebis goes to *Rumery's* consideration of the defense attorney's experience. Furthermore, Becky alleges that she was told that if she did not sign the agreement, that charges against her father would not be reduced and that he would be forced to go to trial. The prosecutor's pitting of one family member against another also weighs against concluding that the agreements were voluntary. The fact-finder should be left to make the determination of whether the Friebis' agreements were voluntary.

As for the second factor, the Court finds some evidence of prosecutorial misconduct. The Plaintiffs presented evidence that Officer Kifer was not only part of the bargaining process, but that he required that the release-dismissal agreement be part of the final pleas agreement The bargaining occurred after the Friebis family had filed a citizen's complaint against Officer Kifer. In addition, there is evidence that Mr. Friebis's plea was conditions on Becky's signing of the release-dismissal agreement. The fact that evidence exists that Mr. Levering used the bonds of a familial relationship to secure the release-dismissal agreement on behalf of Officer Kifer points to the possibility of prosecutorial misconduct. Two factors weight in favor if finding that there was no prosecutorial misconduct: (1) Mr. Friebis and Becky had already been charged when the agreements were first mentioned, and (2) no additional charges were ever filed against the Friebis family. However, for purposes of this motion, the evidence must be construed in the light most favorable to Plaintiffs, these factors are outweighed by the evidence militating in favor of the possibility of prosecutorial misconduct.

Furthermore, substantial evidence of police misconduct can be used as evidence of prosecutorial misconduct. In *Coughlen*, the Sixth Circuit found that:

> [s]hould a court conclude that a prosecutor secured a release-dismissal agreement

> bargain in the face of substantial evidence of police misconduct, the court could take this as evidence of prosecutorial misconduct, since it would demonstrate that 'the coercive power of criminal process' was being 'twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.'

5 F.3d at 974 (quoting *Rumery*, 480 U.S. at 400). Against this backdrop, the Court must consider whether there is substantial evidence of police misconduct. In this case, there is evidence that if believed, would indicate that Officer Kifer had no basis on which to arrest Plaintiffs or to seize Mrs. Friebis. Plaintiff's evidence suggests that the subsequent charges lodged against Becky and Mr. Friebis were unfounded and were used as "bargaining chips" to induce Becky and Mr. Friebis to give up their civil rights actions against Officer Kifer. Plaintiffs argue that the prosecutorial misconduct inheres in the fact that the prosecutor knew that Becky and Mr. Friebis would have a meritorious claim against Officer Kifer, and that the prosecutor maintained the criminal charges to protect Officer Kifer. Based on these factors, the Court finds that there is evidence which, if believed, could lead a reasonable jury to conclude that prosecutorial misconduct occurred.

Finally, the public interest will not be served by upholding the agreements. Although the Plaintiffs were able to enter in to plea agreements that reduced their charges and their sentences—release-dismissal agreements included a forfeiture of civil rights and of the right to bring suit against an Officer whose behavior was at least questionable under the circumstances. Although a trial was avoided in municipal court, which arguably added to judicial economy, this factor cannot outweigh the alleged constitutional infringement on the Friebis family's rights.

For these reasons, Officer Kifer's Motion for Summary Judgment on the release-dismissal agreement is **DENIED.**

B. Fourth Amendment—Unlawful Seizure.

1. Mrs. Beatrice Friebis

The Fourth Amendment of the United States Constitution protects persons from "unreasonable searches and seizures." U.S. CONST. amend. IV. To establish a Fourth Amendment claim, first, there must have been a "seizure," and second, that seizure must have been unreasonable. *Graham v. Connor,* 490 U.S. 386 (1989) (holding that "[*a*]*ll* claims that law enforcement officer have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment. . ."); *Cameron v. City of Pontiac*, 813 F.2d 782 (6th Cir. 1987) (finding that "[t]he reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there was a completed seizure. . . .") (quoting *Galas v. McKee,* 801 F.2d 200, 203 (6th Cir. 1986)); *Johnson v. City of Detroit*, 944 F. Supp. 586 (E.D. Mich. 1996) (finding that "[t]he conduct complained of must not only constitute a seizure, it must also be unreasonable to run afoul of the Fourth Amendment.") One way the seizure could be deemed to be is if it involved an excessive use of force. *Graham*, 490 U.S. at 394-97.

First, this Court must determine whether a seizure occurred. In a public place, the seizure of a person occurs if "[i]n view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980); *see also United States v. Salvo*, 133 F.3d 943, 949 (6th Cir. 1998). Even if the person did not attempt to leave, examples of what conduct may constitute a seizure include: "[s]ome physical touching of the person of the citizen, or the use of language or tone of voice

indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 544. In other words, a person is seized if "'by means of physical force or a show of authority, his freedom of movement is restrained.'" *United States v. Peters*, 194 F.3d 692, 697 (6th Cir. 1999) (quoting *Mendenhall*, 446 U.S. at 553).

Second, to determine whether the force used in a seizure is "reasonable," the "nature and quality of the intrusion on the individual's Fourth Amendment interests' must be balanced against the governmental interest. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). "Reasonableness" is an objective standard and must be judged through the "perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396-97. As an objective standard, the officer's intent and motivation are not taken into consideration. *Id.* at 397. In determining the "nature and quality of the intrusion" the nature and severity of the injury must be taken into consideration. *Martin v. Heideman*, 106 F.3d 1308, 1312 (6th Cir. 1997). The Supreme Court cautioned that "'[n]ot every push or shove, even if it may later seem unnecessary on the peace of a judge's chambers' violates the Fourth Amendment." *Graham*, 490 U.S. at 397 (citations omitted).

Accepting Mrs. Friebis's testimony as true, Officer Kifer argues that, grabbing her arm, twisting it, and moving Mrs. Friebis to a street corner, does not constitute seizure under the Fourth Amendment. Mrs. Friebis believed that she was free to leave the location at any time during the events that transpired and did in fact leave. At most, Mrs. Friebis had a brief encounter (three seconds) with Officer Kifer that amounted to an assault and battery.[7] In response, Mrs. Friebis argues that there is a dispute of material fact as to whether Officer Kifer's actions constituted an unnecessary use of force. The Plaintiff

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[7] Officer Kifer concedes that Mrs. Friebis's claim is one of assault and battery survives summary judgment.

contends that she can maintain a Fourth Amendment claim based solely on an excessive use of force. The Plaintiff concludes that causing severe pain for one minute or less, without the presence marks on her skin or the need for medical treatment, can constitutes actionable excessive force.. *See Holmes v. City of Massillon*, 78 F.3d 1044 (6th Cir. 1996).

Initially, the Court finds that the Defendant's argument is correct, that there first must be a seizure before there can be a determination of whether excessive force was used during the seizure. *See Cameron v. City of Pontiac*, 813 F.2d 782 (6th Cir. 1987); *Galas v. McKee*, 801 F.2d 200, 203 (6th Cir. 1986); *Johnson v. City of Detroit*; 944 F. Supp. 586 (E.D. Mich. 1996). The Court finds that Mrs. Friebis was "seized" within the meaning of the Fourth Amendment, as she was physically touched by Officer Kifer, her freedom of movement was restrained; she was grabbed and aggressively escorted to the sidewalk. Even though this encounter was brief, the length of time of the seizure is irrelevant in determining if in fact a seizure did occur.[8] Clearly, I this case, the Court concludes that Mrs. Friebis was seized as her "freedom of movement was restrained" by "physical force." *United States v. Peter*, 194 F.3d 692, 697 (6th Cir. 1999) (quoting *Mendenhall*, 446 U.S. at 553).

Viewing the facts a light most favorable to the non-moving party, a reasonable officer on the scene could conclude that the force used by Officer Kifer was unreasonable. The nature and quality of the intrusion—several bruises and a twisted shoulder—is great compared to the governmental interests—the safety of Mrs. Friebis who had walked into a side street in the protection of a police cruiser. This Court finds that a reasonable fact finder could conclude that this particular "push and shove" violated the Fourth Amendment.

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[8] For example, if an officer were to walk up to a person and punch her in the nose, the punch would last second, yet the person would have been said to have been seized by the officer.

Mrs. Friebis, in her argument, relies upon *Holmes* to support her assertion that physical contact is not necessary for a claim of unreasonable force. The plaintiff, in *Holmes*, was asked to remove her wedding ring after she was arrested, but was unable to because her fingers were swollen. *Holmes*, 78 F.3d at 1043-44. The defendant-officer got in the plaintiff's face, screamed at her, wrenched the plaintiff's finger and continued to do so for about five minutes. The plaintiff complained of pain and asked the officer to stop. *Id.*

The Court, in *Holmes*, relied upon *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992), when it concluded that an excessive force claim does not have to include physical contact. *Holmes* relied on *Cornwell* for reasons inapplicable here. First, the plaintiff in *Cornwell* was a prisoner whose excessive force claim was based on the fact that he was forced to lie face-down on the cold, muddy ground in forty degree weather during an inmate search. *Cornwell*, 963 F.2d at 914-16. The district court had submitted the plaintiff's claims to the jury under the Fourth and the Eighth Amendments. On appeal, the Sixth Circuit found that it was err for the district court to submit the plaintiff's excessive force claim to the jury under the Fourth Amendment. *Id.* at 916. As a result, the circuit court reversed the jury's verdict in favor of the defendant on the Fourth Amendment claim as it related to the excessive use of force. *Id.* at 918. The jury found for the defendant on the plaintiff's Eighth Amendment claim of cruel and unusual punishment which was based on the same facts as the plaintiff's excessive use of force claim. That finding was upheld on appeal. *Id.*

The finding of *Holmes* that the Plaintiff relies upon, *i.e.*, than an excessive force claim does not have to involve physical contact, is questionable in light of *Cornwell*. First, the plaintiff in *Cornwell* was an inmate. Second, the inmate-plaintiff was forced to lie face-down, in the mud, in forty degree weather. This "force" is of greater harm that

being aggressively escorted by your arm onto the sidewalk, or having your finger "wrenched" by an officer. Finally, and most importantly, the jury's Fourth Amendment conviction in *Cornwell* was overturned by the Sixth Circuit. And as for the Cornwell's Eighth Amendment claim, based on the same conduct, the jury found for the defendants.

Based on this, this Court finds that the Plaintiff's reliance on *Holmes* is in err, and this Court will not rely on *Holmes* in reaching its conclusions. Instead, this Court relies upon well-established Supreme Court and Sixth Circuit precedent, *see, e.g., United States v. Mendenhall,* 446 U.S. 544 (finding that a seizure occurs even if the person did not feel free to leave if there exists "[s]ome physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."); *United States v. Salvo*, 133 F.3d 943, 949 (6th Cir. 1998) (same); *see also United states v. Peters,* 194 F.3d 692, 697 (6th Cir. 1999) (quoting *Mendenhall*, 446 U.S. at 553) (finding that a person is seized if "'by means of physical force or a show of authority, his freedom of movement is restrained.'"), in reaching its conclusion that a reasonable fact finder could conclude that Mrs. Friebis was subject to unreasonable physical force and was seized under the Fourth Amendment. The Defendant's Motion for Summary Judgment is **DENIED.**

C. Assault and Battery.

1. Mrs. Beatrice Friebis.

With respect to Beatrice, the Defendants claim that they are entitled to summary judgment on every claim *except* the state law claim of assault and battery. The Plaintiff's assault and battery claim therefore survives the Defendants' Motion for Summary Judgment.

D. False Arrest and False Imprisonment

1. Mrs. Beatrice Friebis

Officer Kifer contends that as Beatrice was not arrested, jailed or charged with a crime, and as a result, her state law claims of false arrest and false imprisonment fail as a matter of law. The Plaintiffs entirely failed to address this claim in their Response.

Federal Rule of Civil Procedure 56(e) provides: "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings. . .the adverse party's response. . .must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(c). The Sixth Circuit, interpreting Rule 56, has found, "[w]here the movant brings forward and supports his motion for summary judgment, his opponent may not rest merely upon his pleadings but rather must come forward to show genuine issues of fact." *Bryant v. Kentucky,* 490 F.2d 1273, 1275 (6th Cir. 1974); *see also Gerber v. Silvery Recovery Sys.,* 729 F.2d 1461 (6th Cir. 1984); *Spells v. Cuyahoga Community College,* 889 F. Supp. 1023, 1026 (N.D. Ohio 1994).

As the Plaintiff has not come forward with anything more than the allegations she set forth in her pleadings, the Court **GRANTS** the Defendants' Motion for summary Judgment on Mrs. Friebis's claims of false arrest and false imprisonment.

E. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress is committed by "'[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other

results from it, for such bodily harm.'" *Yeager v. Local Union 20,* 453 N.E.2d 666, 671 (Ohio 1983) (citations omitted). "Extreme and outrageous" conduct is defined as "conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.* (citations omitted.)

1. Mrs. Beatrice Friebis

Officer Kifer argues that Mrs. Friebis's claim of intentional infliction of emotional distress fails as a matter of law because his conduct was not outrageous and did not cause any severe debilitating harm to Mrs. Friebis. In their Reply, the Defendants point out that the Plaintiffs failed to address this claim.

The Court hereby **GRANTS** the Defendant's Motion for Summary Judgment on this claim as the Plaintiff has not come forward with anything more than the allegations made in her initial pleading. FED. R. CIV. P. 56(e). *See Bryant v. Kentucky,* 490 F.2d 1273, 1275 (6th Cir. 1974).

2. April Friebis

The Defendants argue that Officer Kifer's conduct, even if accepted as true, does not constitute extreme and outrageous conduct, and that April has not suffered serious emotional distress. The Plaintiffs argue that a jury should determine whether sending away a paramedic, telling April to shut up, and telling her to quit crying while she was trapped in a crushed vehicle, was extreme and outrageous conduct.

The Court finds that Officer Kifer's conduct in telling the paramedic to move away from April was not, in isolation, outrageous. Taken in the totality of the circumstances, however, Officer Kifer's conduct in telling April to "shut up" and to "quit crying" while she was trapped in a car and after he sent the paramedic away could lead a reasonable jury to conclude that Officer Kifer's conduct was extreme and outrageous conduct that could be considered to be "utterly intolerable in a civilized community." The Defendant's Motion for Summary Judgment is **DENIED**.

F. The City of Columbus

The Defendants argue that since no allegations against Officer Kifer amount to a constitutional violation and/or because such claims are barred by a valid release-dismissal agreement, that the City of Columbus cannot be held liable. *See City of Oklahoma v. Tuttle*, 471 U.S. 808, 817 (1985); *Burke v. Johnson*, 167 F.3d 276 (6th Cir. 1999). The plaintiffs argue that since there are genuine issues of material fact with regard to the claims of Officer Kifer, that the City cannot be granted summary judgment.

The Court finds that because Officer Kifer's Motion for Summary Judgment has been denied, the City of Columbus is not entitled to summary judgment on the constitutional claims brought against them.

IV. CONCLUSION

For the foregoing reasons, Officer Kifer's Motion for Summary Judgment with respect to Mr. Friebis and Becky's release-dismissal agreement and Mrs. Freibis's Fourth Amendment claim is **DENIED**. The Defendant's Motion for Summary Judgment with respect to Mrs. Friebis's false arrest, false imprisonment, and with respect to Mrs. Friebis's intentional infliction of emotional distress is **GRANTED**. April's intentional infliction of emotional distress claims is **DENIED**. As claims exist against

Officer Kifer, the Defendant's Motion for Summary Judgment with respect to the City of Columbus is hereby **DENIED.**

IT IS SO ORDERED.

ALGENON L. MARBLEY
UNITED STATES DISTRICT COURT

Dated: March 27, 2000

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BEATRICE FRIEBIS, et al.,	:	
Plaintiffs,	:	**Case No. C2-98-946**
v.	:	**JUDGE MARBLEY** **Magistrate Judge Kemp**
OFFICER JOHN KIFER, et al.,:		
Defendants.	:	

AFFIDAVIT OF ROBERT B. LEVERING

STATE OF OHIO)
:ss
COUNTY OF FRANKLIN)

1. My name is Robert B. Levering. I am over eighteen years of age, fully competent to make this affidavit, and have personal knowledge of all the facts stated herein, unless stated to be based on information and belief.

2. I am employed as an assistant city attorney with the Columbus City Attorney's office. I have been employed in this capacity since 1981, except for an eight-month period when I was employed with the Ohio Attorney General's office.

3. As an assistant city attorney in the Prosecutor's Division, I have prosecuted approximately 125 criminal jury trials and over 1,000 criminal bench trials.

4. In February 1998, I was assigned as a prosecutor to Municipal Court Judge Teresa L. Liston's courtroom. On February 3, 1998, the cases of *City*

of Columbus vs. Kathryn R. Friebis, Case No. M9709CVR-024156 and *City of Columbus vs. Robert L. Friebis*, Case No. M9709CRB-02155, were set for trial beginning at 1:30 p.m. This was the third scheduled trial date for both cases.

5. My preparation for the case involved reviewing the prosecutor's case file, including the arresting officer's statement (Officer Kifer) in the U.10-100, copies of which are attached hereto. I also spoke at length with assistant City Attorney Robert Tobias, who previously was assigned the case in 1997. Prosecutor Tobias is an experienced and well-respected colleague. He indicated to me that several eyewitnesses at the scene supported Officer Kifer's version of the facts and that he intended to try the case if I could not. The eyewitnesses were subpoenaed for trial on February 3, 1998. I was prepared to take the case to trial if a plea agreement was not reached by the defense.

6. In my judgement, there was probable cause to arrest both Kathryn Friebis and Robert Friebis on the charges brought by Officer Kifer. At no time was I aware of and evidence of misconduct on the part of Officer Kifer.

7. My initial thought was for each defendant to plead to a reduced charge of disorderly conduct, a misdemeanor of the fourth degree. While I had sympathy for the relative of the defendants who had been injured in the traffic accident, it appeared the defendants had emotionally overreacted to the situation and had ended up forcing Officer Kifer to arrest them to remove a nuisance from the accident scene at a major traffic intersection. This type of situation, where someone who may initially be a victim lets their emotions get the better of them and ends up getting arrested, is reasonably common.

8. The day that this case was set for trial was busy and Kenneth Spiert, defendant's counsel, approached me and we discussed the case briefly. I indicated that I would have to talk to the arresting officer before I made a plea offer.

9. Officer Kifer was present and I suggested to him that a plea to the disorderly conduct charge would be appropriate for both defendants and he agreed to that plea offer. I communicated the plea offer to Mr. Spiert and he left to talk to his clients.

10. Mr. Spiert returned and told me the father (Robert Friebis) was willing to plead to a minor misdemeanor disorderly conduct as he recognized that a jury could find that the father's reaction in touching the officer was inappropriate, and that the daughter (Kathryn Friebis) was willing to pay a bail forfeiture. Mr. Spiert also indicated that his clients would execute releases. He mentioned the releases first and I did not solicit them.

11. I relayed the counter-offer to Officer Kifer and he agreed to it. While I felt that the officer was justified in arresting the defendants, I felt the plea agreement was fair and sufficient punishment for the defendants and a generous plea bargain.

12. A release form was obtained from Judge Liston's bailiff since Mr. Spiert did not have any release forms with him.

13. Mr. Spiert then went off with his clients and discussed the plea bargains and released for a significant period of time.

14. Thereafter all the parties went before Judge Liston and made a record of the plea bargain and releases.

15. I have read the foregoing affidavit and all the statements are true and correct and based on personal knowledge, unless stated otherwise.

Further, affiant sayeth naught.

_____

Robert B. Levering

SWORN TO BEFORE ME and subscribed in my presence this __2____ day of September, 1999.

NOTARIAL SEAL
STATE OF OHIO

GARY F. COLLINS
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires March 19, 2003

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO
CRIMINAL DIVISION

- - -

City of Columbus,	:	
Plaintiff,	:	
v.	:	Case No. M9709CRB-024156
Cathryn R. Friebis,	:	
Defendant	:	

- - -

City of Columbus,	:	
Plaintiff,	:	
v.	:	Case No. M9709CRB-024155
Robert L. Friebis,	:	
Defendant.	:	

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TRANSCRIPT OF PROCEEDINGS

- - -

HONORABLE TERESA L. LISTON
Judge, presiding.

- - -

Linda M. Howell,
Official Court Reporter

- - -

APPEARANCES:

JANET E. JACKSON, City Attorney
City Hall, 90 West Broad Street, Columbus, Ohio,
By: Robert Levering, Asst. City Prosecutor

On behalf of the City

KENNETH R. SPIERT, Attorney at Law
1717 Bethel Road, Columbus, Ohio,

On behalf of the Defendants.

- - -

BE IT REMEMBERED THAT, on the 3d day of February, 1998, this cause came on for hearing before the Honorable Teresa L. Liston, Judge. and the parties appearing in person and/or by counsel, as herein set forth, the following proceedings were had:

- - -

THE COURT: City of Columbus versus Cathryn Friebis.

MR. LEVERING: Yes, Your Honor. This is Case No. M97-24156, City of Columbus versus Cathryn Friebis, currently charged with obstructing official business. We're going to move to amend that to disorderly conduct, a minor misdemeanor, and would ask the Court to accept a $160 bail forfeiture to include costs.

THE COURT: Ms. Friebis, the prosecutor has indicated to the Court that he is willing to resolve this matter if the Court will allow you to post bond in the amount of $160 to the clerk of this court and have that amount forfeited: that means given up. After speaking with your attorney, first of all, do you understand the plea bargain and disposition being offered to you in this case?

MRS. FRIEBIS: Uh-huh, yes.

THE COURT: After consulting with your attorney, are you in agreement with this?

MRS. FRIEBIS: Yes.

THE COURT: Are you prepared to post the $160 bond here today?

MRS. FRIEBIS: Check, right?

THE COURT: The clerk of courts does not accept personal checks, only cash, Master Card, or VISA.

MRS. FRIEBIS: Gotcha.

THE COURT: So, then, you will be able to post that here today?

MRS. FRIEBIS: (Nods head.)

THE COURT: And also in exchange for this disposition of the case, you and your attorney have entered into an agreement that is a release of liability. Did your lawyer go through this with you, ma'am?

MRS. FRIEBIS: Yes.

THE COURT: And do you understand that you are releasing the City from any further liability in this case, that you are agreeing not to sue anyone?

MRS. FRIEBIS: Uh-huh, yes.

THE COURT: Then the Court will enter by agreement bail forfeiture in the amount of $160 to include all the court costs to be posted forthwith to the amended charge.

Mr. Spiert, will you need a photocopy of this release for your records?

MR. SPIERT: Yes, Your Honor, if I might.

THE COURT: Then I'll have my bailiff provide you with a copy here before you leave.

MR. SPIERT: Thank you, Your Honor.

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THE COURT: City of Columbus versus Robert Friebis.

MR. LEVERING: Yes, Your Honor. This is Case No. M97-24155, City of Columbus versus Robert Friebis. Mr. Friebis is charged with obstructing official business, resisting arrest. We're going to move to amend the resisting arrest charge to disorderly conduct, a minor misdemeanor, in return for a change of plea to that. There is also, as part of this plea bargain, been a release executed by the defendant.

THE COURT: Sir, you're now before this Court on one amended charge of disorderly conduct. The maximum penalty that you now face is a fine only of up to $100. After consulting with your attorney, do you understand when you signed this statement, you have given up your right to have a trial?

MR. FRIEBIS: Yes.

THE COURT: And, also, sir, after consulting with your attorney, do you understand that by signing this agreement entitled "Release," that you agree not to sue the City as a result of this incident?

MR. FRIEBIS: Yes.

THE COURT: How do you plead to the amended charge of disorderly conduct?

MR. FRIEBIS: Guilty.

THE COURT: Is there anything further on behalf of the City?

MR. LEVERING: No, Your Honor. Neither one of these two individuals have a record.

THE COURT: Mr. Spiert, do you have a statement in mitigation of penalty?

MR. SPIERT: Yes, Your Honor, just a few comments.

Mr. Friebis is a 60-year-old father of five, long time resident of -- life-long resident of Columbus. He's worked for 44 years at Borchers Carpet Company down on Front Street, and in his 60 years, he's never gotten any kind of conviction or charge. He has no record at all.

This is a situation where his daughter had been arrested and had been forcibly taken into custody by a police officer. And Mr. Friebis was afraid that the officer was about to slam her head onto the patrol car, at which point he intervened, touched the officer's arm, and said, "That's not necessary," something to that effect. And he's – with his plea, he's accepted responsibility for what he did, but I was hoping the Court would consider the mitigating factors that occurred at the time.

It was an emotional scene. Mr. Friebis's other daughter had just been in a serious accident. She was injured. She was in the van being taken out by the medics. And in the course of that, his second daughter was arrested, and as I said, was being forcibly removed from the scene, and Mr. Friebis intervened in that state of mind. So we would hope that the Court would consider that in sentencing.

THE COURT: And, Mr. Spiert, it appears that your client was arrested in this matter?

MR. SPIERT: That's correct.

THE COURT: And has one day of jail credit?

MR. SPIERT: Exactly, Your Honor.

THE COURT: Mr. Friebis, do you have anything that you'd like to say?

MR. FRIEBIS: No. He said pretty much everything.

THE COURT: The fine in this matter is suspended for the time you've already served in jail on this charge, and you are ordered to pay the court costs.

If your client prepared to do that today?

MR. FRIEBIS: Yeah, yes.

THE COURT: Those are to be posted forthwith.

And, likewise, Mr. Spiert, my bailiff will provide you with a photocopy of the release agreement.

MR. SPIERT: Thank you, Your Honor.

MR. LEVERING: Thank you, Your Honor.

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C-E-R-T-I-F-I-C-A-T-E

I do hereby certify that the foregoing is a true, correct, and complete written transcript of the proceedings in this matter, taken by me on the 3d day of February, 1998, and transcribed from my stenographic notes.

_____

Linda M. Howell,
Official Court Reporter

RELEASE – DISMISSAL AGREEMENT

KNOW ALL PERSONS BY THESE PRESENT that I, Kathryn R. Friebis, on behalf of myself and my agents, employees, partners, heirs, administrators, executors, affiliates, successors and assigns, and in consideration for the promise and agreement to ~~dismiss~~ reduce certain criminal charges now pending before the Franklin County Municipal Court against me arising out of or related to, the below-described incident occurring on or about September 10, 1997, and other valuable consideration, forever release, acquit and discharge John Kifer, M. J. Graves, C. L. Hay, the Columbus Division of Police, the City of Columbus and the State of Ohio and their employees and agents, from any and all liability, claims, actions and compensation, on account of or arising out of or resulting in any manner from the arrest and/or prosecution of an incident occurring at or near Wilson Rd. and Valleyview Dr., on or about the 10th day of September, 1997.

I further state that I have voluntarily entered into this Release-Dismissal Agreement of my own free will and I understand that by signing this agreement I forever release and discharge the above named parties from all liability arising out of the above stated incident. I have consulted with and been advised by my attorney fo the legal aspects and consequences of signing this Release-Dismissal Agreement.

I further agree that this that this agreement is in full accord and satisfaction of a disputed claim and is entered into to fully terminate and settle any further controversy respecting all claims resulting from the above stated incident.

IN WITNESS WHEREOF, I have signed this Release-Dismissal Agreement on this 3rd day of February, 1998.

PARTY SIGNING RELEASE

Witnesses:

ATTORNEY FOR RELEASING PARTY

Who by his/her signature acknowledges that the above named party has been fully advised and informed as to the legal aspects and consequences of the signing this Release-Dismissal Agreement and has voluntarily, knowingly and deliberately executed this release.

JUDGE PRESIDING OVER THE CASE

PROSECUTOR

Ref: Town of Newton v. Rumery (1987), 480 U.S. 386, 1207 sup. Ct. 1187, 94 L. Ed. 2d 405

RELEASE – DISMISSAL AGREEMENT

KNOW ALL PERSONS BY THESE PRESENT that I, Robert L. Friebis, on behalf of myself and my agents, employees, partners, heirs, administrators, executors, affiliates, successors and assigns, and in consideration for the promise and agreement to ~~dismiss~~ reduce certain criminal charges now pending before the Franklin County Municipal Court against me arising out of or related to, the below-described incident occurring on or about September 10, 1997, and other valuable consideration, forever release, acquit and discharge John Kifer, M. J. Graves, C. L. Hay, the Columbus Division of Police, the City of Columbus and the State of Ohio and their employees and agents, from any and all liability, claims, actions and compensation, on account of or arising out of or resulting in any manner from the arrest and/or prosecution of an incident occurring at or near Wilson Rd. and Valleyview Dr., on or about the 10th day of September, 1997.

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ATTORNEY FOR RELEASING PARTY

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JUDGE PRESIDING OVER THE CASE

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